(1) Supreme Court U.S.

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No. 99-

In The Supreme Court of the United States

THOMAS P. JASIN,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether proof that a defendant's conduct was advantageous to a conspiracy, and that his conduct furthered a goal common to that conspiracy and involved some overlap with members of that conspiracy, obviates any need to inquire whether the defendant knew of and intended to join that conspiracy.

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OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals is printed in the appendix at page 1a. ("Pet. App.") The opinion of the court of appeals denying rehearing and rehearing in banc printed at Pet. App. 55a. The unpublished opinion of the district court appears in the appendix at Pet. App. 21a.

JURISDICTION

The court of appeals entered judgment on August 12, 1999, (Pet. App. 20a) and denied petitioner's petition for rehearing and suggestion for rehearing in banc on September 20, 1999 (*id.* at 55a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

1. 18 U.S.C §371 provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

2. 22 U.S.C. §2778, the Arms Export Control Act, provides in pertinent part:

> (a)(1) In furtherance of world peace and the security and foreign policy of the United States, the President is authorized to control the import and export of defense articles and defense services and to provide foreign policy guidance to persons of the United States involved in the export and import of such articles and services. The President is authorized to designate those items which shall be considered as defense articles and defense services for the purposes of this section and to promulgate regulations for the import and export of such articles and services. The items so designated shall constitute the United States Munitions List . . . .
>
> (b)(2) . . . no defense articles or defense services designated by the President under subsection (a)(1) of this section may be exported or imported without a license. . . .

> (c) Any person who willfully violates any provision of this section . . . shall upon conviction . . . be fined . . . or imprisoned not more than ten years, or both.

3. 22 U.S.C. § 5053 (of the Comprehensive Anti-Apartheid Act, 22 U.S.C. § 5001 et seq.) provided in pertinent part:

> no article which is grown, produced, manufactured by, marketed, or otherwise exported by a parastatal organization of South Africa may be imported into the United States . . . . (Repealed 1986.)

4. 18 U.S.C. § 1956 provides in pertinent part:

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity . . . .
>
> (A)(i) with the intent to promote the carrying on of specified unlawful activity; . . . shall be sentenced to a fine . . . or imprisonment . . . .

STATEMENT OF THE CASE

1. This case stems from the conviction of petitioner, Thomas P. Jasin for a broad, multi-faceted conspiracy based on his work at International Signal and Control ("ISC"), a company involved in the domestic and international sale of weapons and weapon technology. Pet. App. 2a-3a. Federal jurisdiction was invoked in the district court pursuant to 18 U.S.C. §3231.

In a 67-count, 129-page indictment, the Government charged that Jasin and 18 other defendants conspired over an eleven-year period with James Guerin, the president and founder of ISC. Pet. App. at 3a, 23a. The objects of the conspiracy were to violate the Arms Export Control Act, 22 U.S.C. § 2778, the Comprehensive Anti-Apartheid Act, 22 U.S.C. §§ 5000 *et seq.*, and various money laundering statutes, 18 U.S.C. §§ 1956, 1957. Pet. App. at 23a.

The centerpiece of the indictment was a 43-page conspiracy count which charged that it was the plan of the conspiracy for ISC to evade the United Nations' embargo by exporting munitions and technology to the Armaments Corporation of South Africa ("Armscor"). *Id.* at 23a; App. 15-58.[1] The indictment describes a long-term conspiracy to break the arms embargo with South Africa. Pet. App. 27a. The conspiratorial plan included establishing front companies to conceal the import and export of millions of dollars worth of defense articles and services. *Id.* It also contemplated giving technology and entire military systems to South Africa. App. 34, 38-9, 47.

According to the indictment, part of the conspiracy consisted of importing components of South Africa's Striker missile from South Africa for testing and evaluation, in an effort to broker a sale of the missiles from South Africa to China. Pet. App. 23a. The indictment explicitly referred to Jasin in conjunction with the Striker program. App. 31.

Count Twenty-Three of the indictment charged Jasin with a violation of the Arms Export Control Act by making false statements concerning the country of origin of certain

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[1] Citations to App. are to the Appellant's Appendix filed in the Third Circuit Court of Appeals.

components. App. 59. The Government voluntarily dismissed this charge. Pet. App. 23a. Count Twenty-Four charged Jasin with another violation of the Arms Export Control Act by exporting and aiding and abetting the exportation to South Africa of missile flight data and technology for the Striker missile. *Id.* at 24a; App. 3488. The jury acquitted Jasin of this charge. Pet. App. 25a. Finally, Count One charged Jasin and 18 others with participation in Guerin's broad conspiracy.

2. Jasin was tried alone, by jury. Pet. App. 4a. The evidence showed he began work at ISC Technologies ("ISCT"), a subsidiary of ISC, in 1984. He first served as Vice President and then became President of ISCT until he was transferred in 1987. *Id.* at 25a.

ISC "generally compartmentalized its programs." *Id.* at 12a. The evidence showed that Guerin always insisted on a strict confidentiality code, demanding that information about any project be disclosed only on a "need to know basis[.]" App. 450, 468. Jasin testified that he had access only to information concerning his projects. *Id.* at 2570.

Jasin's responsibilities at ISCT included overseeing the Striker program. App. 2404. He received assistance with this project from Clyde Ivy, another ISC employee. Pet. App. 30a. Ivy was involved in numerous ISC programs that related to South Africa and did not involve Jasin. See *id.* at 13a, 30a.

The Government presented evidence of a long-term conspiracy between ISC and Armscor to assist South Africa in evading the arms embargo. *Id.* at 3a. The Government established that Guerin and Ivy had a longstanding relationship with Armscor. *Id.* at 30a. The Government further contended that ISC, without a license from the State Department, exported millions of dollars worth of components that were included on

the United States munitions lists. *Id.* ISC and Armscor used numerous front companies to conceal the shipments of components and military systems to South Africa. App. 386, 402, 404, 406, 413.

The Government contended that Jasin took steps that furthered this broad conspiracy through his work on the Striker missile program. App. 3274. In particular, the Government contended that Jasin knowingly smuggled Striker parts from South Africa via Italy, App. 3277, 3279, and that he improperly arranged to test the missile in the United States. App. 3297. The Government maintained that the purpose of the latter act was to transfer technology to the South Africans. App. 3298-9.

Jasin defended his conduct on the Striker missile project by pointing out that the idea for facilitating an arms sale to China originated in a meeting at ISC with Alexander Haig Jr., the former Secretary of State. App. 2103. Former Secretary Haig explained that the United States wanted to help the Chinese acquire a weapon to defend itself against a Soviet advance. *Id.* at 2104. The Striker Missile Project also had the backing of the Central Intelligence Agency, which was interested in learning about the technology available to South Africa and to China. *Id.* at 2098-2103. In addition, Jasin had discussions with the military about the Striker technology and attended a meeting regarding Striker at the Pentagon with five representatives from the army and a representative from the Secretary of Defense's office. *Id.* at 2221, 2276-77.

Jasin testified that he believed it was legal to import components from South Africa via Italy so long as value was added to the components, meaning that the components were substantially transformed from their original state. App. 2203. He also testified that he consulted with a lawyer prior to importing the components. App. 2203, 2260. In addition, in

1987, Jasin was transferred and entirely removed from the Striker project. App. 2325, 2327.

In its closing argument, the government claimed there was a "massive conspiracy[,]" and conceded "[o]f course . . . [Jasin was] not part of all of it." App. 3373. Nevertheless, the government told the jury that to prove a conspiracy, it only had to link Jasin to the Striker missile program. "The single question I submit to you for your consideration is, did Thomas Jasin participate knowingly and willfully in connection with the acts *linked to Striker*." App. 3274 (emphasis added).

3. The district court instructed the jury on the elements of a conspiracy, including the requirement that a defendant knowingly and willfully became a member of "the" conspiracy[.]"[2] *Id.* at 3454. The district court also told the jury that if it finds the defendant was a member of "the conspiracy" it could consider "any acts done or statements made in furtherance of the conspiracy by persons also found by you to have been members of that conspiracy[]" against the defendant. App. 3465.

The district court further instructed the jury that it must determine whether the Government proved one independent conspiracy or several smaller conspiracies.[3] App. 3456-57. At

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[2] The district court provided a detailed explanation of the terms knowingly and willfully which concluded as follows: "In sum, the defendant with an understanding of the unlawful character of the conspiracy must have intentionally engaged, advised, or assisted in the conspiracy for the purpose of furthering the illegal understanding. If he does so, he becomes a knowing and willing participant in the unlawful agreement, that is to say, a conspirator." App. 3462.

[3] Specifically, the court instructed the jury that: "When two or more

(continued...)

no point, however, did the district court instruct the jury as to how it should determine whether Jasin had knowingly joined the broad conspiracy charged in the indictment or had joined only in a conspiracy limited to the Striker program.

The court rejected Jasin's instruction which focused on the evidence necessary to determine whether Jasin was a member of the master conspiracy. App. 1953, 1957-8, 3196. That proposed instruction provided in part:

> You may judge defendants only on the charges alleged in the indictment . . . .
>
> In this case, the defendant contends . . . that there were actually several separate and independent, conspiracies with various groups of members and, at best, Defendant Jasin was involved in a conspiracy outside of the one charged in the Indictment.
>
> Two or more conspiracies cannot be merged by the Government in a single Indictment for the sake of convenience, even if you find that all the alleged transactions occurred in this case. There must be evidence linking all the charged conduct together into a

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(... continued)
people join together to further one common unlawful design or purpose, a single conspiracy exists. By way of contrast, multiple conspiracies exist when there are separate unlawful agreements to achieve distinct purposes. Now, having said that, you can also have a single conspiracy designed to accomplish more than one purpose. That is what the Government says they have in this case." App. 3457. The court also instructed the jury that "Proof of several separate and independent conspiracies is not proof of the single overall conspiracy charged in the indictment in this case unless one of the conspiracies proved happens to be the single conspiracy described in the indictment." *Id.*

> single overall conspiracy, and you must so find. In addition, you must find that the defendant himself was involved in that one master charged conspiracy. . . .
>
> . . . .
>
> Again, if you find that defendant Jasin was a member of another conspiracy, and not the one charged in the indictment, they [sic] you must acquit him of the conspiracy charge. Pet. App. 57a-59a.

During its deliberations, the jury asked the trial court several questions that revealed its confusion over how to determine whether Jasin was guilty of joining the broad conspiracy charged by the government. The jury had been given a redacted version of the indictment that included the 43-page conspiracy charge. App. 15, 55, 3450. It asked which pages of the indictment describe "the conspiracy we must consider . . . ." *Id.* at 3774. It also questioned: "Are we supposed to study and review the indictment to make sure the charges of Count 1 [Conspiracy] are exactly what Tom Jasin was indicted for?" *Id.*

The district court discussed both questions simultaneously with counsel. App. 3773-3782. The court understood these questions to mean that "if the Government does not prove the charges of the indictment but proves something else, is that something that they should consider." *Id.* at 3778. The court told counsel, "I'm not going to answer that question. I'm going to say if that is a question that they have to let us know." *Id.* In response to both questions, the court then gave a supplemental instruction that simply referred the jury to the court's conspiracy charge and to the paragraph in the indictment describing the three alleged objects of the conspiracy. *Id.* at 3783-3784.

Following this supplemental instruction, the jury asked additional questions. First it asked, "if there's something . . . that we agree was a violation of . . . one of those three objectives . . . that's not described in those pages, does that still apply to Count 1 [conspiracy]?" *Id.* at 3786. Next, the jury asked whether it should "consider the overt acts in trying to establish if the defendant was a member of the conspiracy or are we to first establish the defendant, if we can establish, if he was a member of the conspiracy?" *Id.* at 3790.

In response, the court provided other supplemental instructions.[4] *Id.* at 3788-90. Again, however, the court did not explain how to determine whether the evidence showed that Jasin was part of the broad conspiracy charged in the indictment or of a smaller conspiracy limited to the Striker missile program.

The jury then requested further clarification, asking if "conspiring to commit any offense under the Arms Export Control Act, the Anti-Apartheid Act or the Money Laundering Statute, be [sic] sufficient to establish the defendant's participation in the conspiracy or must the defendant conspire to commit one of the offenses set forth in the description of the conspiracy . . ." *Id.* at 3798. The jury also requested guidance

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[4] The court instructed the jury as follows: "the Government can prove overt acts in furtherance of the conspiracy that are not set forth in the indictment. So, that if you conclude that something in the evidence constituted an overt act and was in furtherance of the conspiracy, then you may consider that. But all of that must be viewed in the context of the conspiracy charge." App. 3788-89. The court also instructed the jury that "you must start with the first element. The Government must prove beyond a reasonable doubt that two or more persons entered the unlawful agreement charged in the indictment and then, you've got to start with the existence of the conspiracy. And then you've got to go to membership in the conspiracy. You've got to follow those instructions along." *Id.* at 3790.

on "the criteria for determining participation in the conspiracy." App. 3800.

The court directed the jury first to consider the existence of a conspiracy and then to "look at the charge on multiple objects and the [sic] look at the multiple conspiracy charge." *Id.* The court again restated the basic principles of conspiracy law given in the charge, but did not explain the difference between finding that a defendant participated in one broad conspiracy and finding that he participated only in separate concerted activity.

After five days of deliberation, the jury acquitted Jasin of the charges that he violated the Arms Export Control Act. Pet. App. 24a. They convicted him, however, of the broad conspiracy charged in Count One of the indictment. App. 3803.

4. Jasin moved for a judgment of acquittal. He argued that "the evidence is insufficient to support his conspiracy conviction because the Government did not prove that Jasin voluntarily joined the Armscor - ISC conspiracy charged in Count One." Pet. App. 42a. Jasin also argued "that he was not even aware that a conspiracy existed." *Id.* at 43a.

The district court rejected Jasin's arguments. It first pointed out that an "agreement by two or more persons" was established because "certain ISC officers and employees were involved in a conspiracy to assist Armscor in breaking the United States arms embargo of South Africa." *Id.* at 44a. Second, the district court found that Jasin knowingly and willfully joined the conspiracy because he knew "that the Striker missile program assisted Armscor in circumventing the United States arms embargo and [was] willing[] to participate in this scheme. . . ." *Id.* at 47a. The district court did not, however, point to any evidence that Jasin was aware of the broader

conspiracy alleged in Count One, let alone that he intended, by his participation in the Striker program, to join that broad conspiracy. See Pet. App. 29a-41a.

5. Jasin appealed to the Third Circuit. He argued, *inter alia*, that his conviction was improper because there was insufficient evidence to link him to the broad conspiracy charged in the indictment. Pet.App. 5a.

The government responded that it was sufficient under Third Circuit precedent to show that it established a core conspiracy between Armscor and Guerin and Ivy; that some of the co-conspirators participated in more than one aspect of the conspiracy even though Jasin did not; and that "the actions of each of the conspirators were either 'necessary or advantageous to . . . the overall success of the venture."[5] Relying on *United States* v. *Kelly*, 892 F.2d 255, 259 (3d. Cir. 1989), the government claimed that this "necessary or advantageous" test was satisfied because "the activities of the conspirators, whenever they were involved, contributed to the success of the conspiracy. . . ."[6]

The Third Circuit Panel affirmed Jasin's conviction. Following *Kelly*, 892 F.2d at 259, it found that the goal of the Striker program "matches that of the larger conspiracy to violate the arms embargo and the arms regulations." Pet. App. 12a. The Panel next determined that "Jasin's participation in the Striker program was advantageous to the larger conspiracy of avoiding the South African arms embargo. The mere fact that Jasin was not fully aware of every detail of the larger

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[5] Appellee's Brief at 43-44 (Third Circuit Court of Appeals) (internal quotations omitted).

[6] *Id.* at 44.

conspiracy because ISC generally compartmentalized its programs does not mean that Jasin failed to cooperate. The jury could have concluded that Jasin was at least conscious of the fact that Striker was only a small part of a larger, ongoing activity." Pet. App. 12a.

The Panel also concluded that there was "overlap"between the participants in the various schemes because "ISC president Guerin was involved in at least one meeting in which the Striker was discussed and apparently had the authority to cancel the importation of the rocket motors. Ivy was involved in the attempt to import the rocket motors, even though he did not keep Jasin apprised of the details . . . . Moreover, both Guerin and Ivy participated in other activities circumventing the arms embargo." *Id.* at 13a.

The Panel noted that in considering a similar case, the First Circuit applied "a different legal test than used in this circuit . . . ." Pet App 12a (*citing United States* v. *Johnson*, 952 F.2d 565, 580 (1991). It did not address, however, whether that different legal test would have led to consideration of different issues than the *Kelly* test, or to a different result. Pet. App. 12a.

REASONS FOR GRANTING THE PETITION

The question whether a particular defendant joined a broad conspiracy or instead joined only a separate, narrower one should not be a particularly difficult question to answer. But in many courts, the issue "remains shrouded in confusion."[7] Different multi-factor tests abound, and courts apply them with

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[7] *United States* v. *Cambindo Valencia*, 609 F.2d 603, 621 (d Cir. 1979).

varying degrees of consistency. The confusion is so pronounced that a leading treatise on federal jury instruction has concluded that "[c]lear guidelines are unavailable for determining whether a single or multiple conspiracies exist."[8]

The Third Circuit's jurisprudence aptly illustrates the problem. In 1989, the Third Circuit borrowed "a three-step inquiry" from the Fifth Circuit "to determine whether a series of events constitutes a single conspiracy or separate and unrelated conspiracies." *United States* v. *Kelly*, 892 F.2d 255, 259 (3d Cir. 1989). In this inquiry, the court first examines "whether there was a common goal among the conspirators." *Id.* Second, the court looks at the "nature of the scheme" to see if the "'agreement contemplated bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators.'" *Id.* (citations omitted). In practice, this convoluted factor has evolved into an inquiry whether activities of one defendant or group of defendants were "'necessary or advantageous to the success of another aspect of the scheme.'" *Id.* (citations omitted). Third, the court examines "the extent to which the participants overlap. . . ." *Id.* (citations omitted).

The Third Circuit borrowed this test in order to determine whether a broad single conspiracy that defendant admittedly joined had subsequently broken down into "separate and unrelated conspiracies." *Kelly*, 892 F.2d at 259. And for that limited purpose, the test, though cumbersome, may be adequate. But the test has since become the touchstone in every Third Circuit case involving multiple conspiracies for

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[8] Edward J. Devitt et al., *Federal Jury Practice and Instructions* §28.02 (14th ed. 1990); *see also* Harriet Galvin & Sherri Venkur, Note, *Resolution of the Multiple Conspiracies Issue via A "Nature of Enterprise" Analysis: The Resurrection of Agreement*, 42 Brook. L. Rev. 243, 253 (1975).

determining whether a defendant participated in the charged conspiracy, and it is completely unsuited to that purpose.

The core problem with the three-factor *Kelly* inquiry is that it fails ever to ask the dispositive question: Did the defendant knowingly agree to join a broad single conspiracy? If the defendant did not knowingly commit to such a conspiracy, then the three factors in *Kelly* simply become irrelevant. Yet in case after case, this crucial question simply goes unasked and unanswered. See, *e.g.*, *United States* v. *Russell*, 134 F.3d 171, 182-83 (3d Cir. 1998); *United States* v. *Quintero*, 38 F.3d 1317, 1337 (3d Cir. 1994); United *States* v. *Padilla*, 982 F.2d 110, 114 (3d Cir. 1992); *United States* v. *Salmon*, 944 F.2d 1106, 1117-1118 (3d Cir.1991).[9]

Although confusion on this issue abounds, there are circuits that fairly consistently apply a different and reasonable test. The panel below noted, for example, that the First Circuit applies "a different legal test than the one used in this circuit . . ." Pet. App. 12a. In the First Circuit, the leading case is *Glenn* v. *United States*, 828 F.2d 855 (1st Cir. 1987) (Breyer, J.). In that case, the court began by observing that "'the gist of the [conspiracy] offense remains the agreement, and it is therefore essential to determine what kind of agreement or understanding existed *as to each defendant*.'" *Id.* at 857 (quoting *United States* v. *Borelli*, 336 F.2d 376, 384 (2d Cir. 1964) (emphasis added in *Glenn*). The court emphasized the

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[9] Fifth Circuit courts, which use this same test, also frequently fail to consider whether the defendant knowingly agreed to join the broad conspiracy charged in the indictment. *See e.g.*, *United States* v. *Morgan*, 117 F.3d 849, 858-59 (5th Cir. 1997); *United States* v. *Gayton*, 74 F.3d 545, 552-53 (5th Cir. 1996); *United States* v. *Fields*, 72 F.3d 1200, 1210 (5th 1996); *United States* v. *Payne*, 99 F.3d 1273, 1280 (5th Cir. 1996); *United States* v. *Gunter*, 876 F.2d 1113, 1120 (5th Cir. 1989).

importance of focusing on the individual defendant's "understanding," because of the risk that an individual may be thought to have joined a conspiracy merely through his membership in a group: "It is dangerous to think of a conspiracy as a kind of 'club' that one joins or a 'business' in which one works . . . . [t]hose metaphors falsely suggest that the 'member' or 'employee' *automatically* becomes legally responsible for the entire enterprise." *Glenn*, 828 F.2d at 857. The court then reversed the conspiracy conviction of appellant Glenn, because the record showed at most that "Glenn *knew* about the [broader conspiracy]; it did not show that he agreed to take, intended to take or actually took any action that he knew would likely further that [conspiracy]." *Id.* at 859.

The dangerous thinking warned of in *Glenn* is exactly what rote reliance on the Third Circuit's *Kelly* test promotes. That test addresses only whether a single conspiracy existed -- it simply never asks whether a particular defendant intended to join it.

Here, for example, the court of appeals, "[u]sing the *Kelly* test as a framework," determined first that the goal of the Striker program in which Jasin participated "matches that of the larger conspiracy to violate the arms embargo and the arms regulations." Pet. App. 12a. A "matching goal," however, proves nothing about whether Jasin even knew of, let alone agreed to join, the broader conspiracy. See *Kotteakos* v. *United States*, 328 U.S. 750, 755 (1946) (separate parallel conduct does not prove a single conspiracy).

Second, the court of appeals found that "Jasin's participation in the Striker program was advantageous to the larger conspiracy of avoiding the South African arms embargo." *Id.* This fact, too, is irrelevant, because Jasin (and many others) could take steps that were "advantageous" to the larger

conspiracy without ever realizing that fact and agreeing to take those steps in order to further that larger conspiracy. Equally irrelevant is the court's related observation that "Jasin was at least conscious of the fact that Striker was only a small part of a larger, ongoing activity." *Id.* Such awareness is common to anyone who joins a business that has multiple employees and projects. It is "dangerous" and improper to assume that a person who joins a business as an employee "automatically" becomes aware of, and committed to, any conspiracy perpetrated by other employees. *Glenn*, 828 F.2d at 857.

Third, the court of appeals found that there was "overlap" between Jasin's program and the broader conspiracy because ISC president Guerin "was involved in at least one meeting in which Striker was discussed" and had authority to cancel a Striker-related transaction in which Ivy also was involved. *Id.* at 13a. Again, this shows, at most, that Striker may have been part of Guerin's and Ivy's broader plan. It thus tends to show that there was a broad conspiracy of which the Striker program was a part. But it does not show anything that is crucial to the case against Jasin: It does not show whether Jasin knew of the broader conspiracy, whether he knew that Striker was a part of the broader conspiracy, or whether he agreed to the broader conspiracy and pursued his work on Striker in furtherance of it.

In short, the court of appeals' ponderous three-part inquiry was entirely beside the point. The court simply never asked the important question. It never determined whether Jasin agreed, expressly or tacitly, to join and further Guerin's broad conspiracy. While the proliferation of multi-part tests and lack of guidance make it difficult to assess what would have happened in other courts, there are at least three circuits in which the settled law would not have permitted this oversight.

In the First Circuit, the law remains clear that an individual defendant cannot be convicted for participation in a broad conspiracy absent proof that he expressly or tacitly joined that particular broad conspiracy. As a panel recited earlier this year: "Each individual must think the aspects of the venture interdependent, and each defendant's state of mind, *and not his mere participation in some branch of the venture* is key." *United States* v. *Portela*, 167 F.3d 687, 695 (1st Cir. 1999) (emphasis added); see also *United States* v. *Johnson*, 952 F.2d 565, 580 (1991); *United States* v. *Boylan*, 898 F.2d 230, 241-42 (1st Cir. 1990). In the Third Circuit, by contrast, the inquiry is simply whether -- from the point of view of any of the conspirators -- the "branch" is truly part of the broad conspiracy.

In the Second Circuit as well, the focus is placed closely on evidence of the individual defendant's personal awareness of and commitment to the broad conspiracy. The leading case of *United States* v. *Borelli*, 336 F.2d 376, 383-84 (2d Cir. 1964), relied on by the First Circuit in *Glenn* as noted above, continues to guide Second Circuit courts. Thus, in *United States* v. *Johansen*, 56 F.3d 347 (2d Cir. 1995), the court reversed defendant's conspiracy conviction and remanded for a new trial because of a failure of proof linking defendant to the broad conspiracy with which he was charged. The court explained:

> To determine whether a single conspiracy or multiple conspiracies have been proven, we focus on what agreement, if any, the jury could reasonably have found to exist vis-a-vis each defendant. . . . [We] then weigh [defendant's] conduct and statements to determine whether a jury could reasonably infer that he participated in the alleged enterprise with a consciousness of its general nature and extent.

Johansen, 56 F.3d at 351. Under the Third Circuit's *Kelly* test, by contrast, this focused consideration of the defendant's awareness of and intent to join the broad conspiracy never takes place.

The Tenth Circuit's law in this area is also well-established. That circuit recognizes that the critical question to ask is "What exactly did . . . [the defendant] think [he or] she was joining?" *United States* v. *Evans*, 970 F.2d 663, 674 (10th Cir. 1992). And in determining whether a defendant may be inferred to have agreed to join a broad conspiracy, the Tenth Circuit focuses on the "interdependence" between the defendant's activities and those of the broader conspiracy, to determine whether there was a mutual and reciprocal relationship in which "each coconspirator's activities constituted essential and integral steps toward the realization of a common illicit goal." *United States* v. *Edwards*, 69 F.3d 419, 432 (10th Cir. 1995) (internal quotations omitted).[10] In the Third Circuit, however, no such essential interdependence is necessary; it is sufficient that a defendant take an action that is "advantageous" to the broader conspiracy, regardless of whether the action is essential, or even known to the actor to be advantageous, to the conspiracy. Pet. App. 12a.

In either the First, Second, or Tenth Circuits, then, the focus in Jasin's case would have been on whether there was sufficient evidence to show that Jasin agreed to join the large conspiracy orchestrated by Guerin and Ivy. In the Third

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[10] *See also United States* v. *Hanzlicek*, 187 F.3d 1228, 1232-33 (10th Cir. 1999); *United States* v. *Bell*, 154 F.3d 1205, 1208 (10th Cir. 1998); *United States* v. *Davis*, 1 F.3d 1014, 1017 (10th Cir. 1993); *United States* v. *Harrison*, 942 F.2d 751, 756 (10th Cir. 1991); *United States* v. *Fox*, 902 F.2d 1508, 1514 (10th Cir. 1990); *United States* v. *Dickey*, 736 F.2d 571, 582 (10th Cir. 1984).

Circuit, however, neither the jury, the district court, nor the court of appeals ever addressed that question. Rather, the government and the courts kept the focus on whether Jasin knowingly participated in the Striker program, and whether that program, in turn, could be found to be part of a larger conspiracy conducted by Guerin and Ivy. In the First, Second, and Tenth Circuits, such findings would not be sufficient, as a matter of law, to support a finding that Jasin knowingly joined Guerin's broad conspiracy as charged in the indictment.

Because the court of appeals concluded that the government proved "one conspiracy" (Pet. App. 10a), it had no occasion to consider the prejudice to Jasin of being convicted for a broad conspiracy he did not join. The prejudice, however, is plain. The touchstone for determining prejudice is "what effect the error had or reasonably may be taken to have had upon the jury's decision." *Kotteakos*, 328 U.S. at 764. Here, the jury's long deliberations and numerous questions about the "criteria for determining participation in the conspiracy" (App. 3800) -- none of which was appropriately answered by the district court -- alone make it "impossible to conclude that substantial rights were not affected." *Kotteakos*, 328 U.S. at 765. Moreover, the jury in this case was given an instruction which permitted Jasin to be liable for "acts done and statements made" by coconspirators. AA 3465. This "transference of guilt" is a classic indicator of prejudice in a conspiracy case, see *Kotteakos*, 328 U.S. at 774 and was highly prejudicial here.[11] It enabled the jurors to consider evidence relevant only to the broad conspiracy charged in the indictment against a defendant the government itself argued was linked to a much narrower scheme.

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[11] *See also Johansen* 56 F.3d at 352 (2d Cir. 1995); *United States* v. *Harrison*, 942 F.2d 751, 758 (10th Cir 1991); *United States* v. *Childress*, 58 F.3d 693, 709 (D.C. Cir. 1995).

Indeed, the likelihood of guilt by association is particularly strong here, because the jury acquitted Jasin of violating the Arms Export Control Act in connection with the Striker program. There is accordingly a significant chance that the jury would not have convicted Jasin of conspiracy had the scope of the conspiracy been limited to the Striker program and had the evidence that could be considered against him been similarly limited.

The uniform application of the criminal law has always been an important factor guiding this Court's discretion in selecting cases for plenary review. The frequent use of a conspiracy charge to "cast a wide net that captures many players"[12] magnifies the importance of ensuring that, regardless of the particular formulation or factors used, every court applies a test that evaluates whether an individual defendant convicted of conspiracy was proven to have knowingly agreed to join that conspiracy. The jury's evident confusion, the inconsistent standards in the court of appeals, and the Third Circuit's now-automatic application of a test that widens conspiracy's net still further by dispensing with essential proof of scienter, fully warrants this Court's review.

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12 *United States* v. *Evans*, 970 F.2d 663, 668 (10th Cir. 1992).

CONCLUSION

For the reasons stated above, the Court should grant the petition.

Respectfully submitted,

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December 20, 1999

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-1641

UNITED STATES OF AMERICA

v.

THOMAS JASIN,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 91-cr-00602-8)
District Judge: Hon. Jan E. Dubois

Argued July 26, 1999

Before: SLOVITER, NYGAARD and McKEE,

Circuit Judges

(Filed: August 12, 1999)

MEMORANDUM OPINION OF THE COURT

SLOVITER, *Circuit Judge*

Thomas Jasin appeals from his conviction following a five-week jury trial on one count of he indictment charging him with conspiracy to violate the Arms Export Control Act, 22 U.S.C. §§ 2778(b)(2), (c), and 22 C.F.R. § 21 *et seq*, the Export Administration Act, 50 U.S.C. App. §§ 2410(a), (b); the Comprehensive Anti-Apartheid Act, 22 U.S.C. § 51 13(b)(3); and various money laundering statutes, 18 U.S.C.§§1956(a)(I)(A)(i), (a)(1)(B)(i), (a)(2)(A), (a)(2)(B)(i), and 1957.

After consideration of all of the issues raised by Jasin's counsel we have determined that there is nothing in our disposition herein that warrants publication under our applicable Internal Operating Procedure. Accordingly, we write for the parties only, and because they are intimately familiar with all of the facts, we see no need to recite them in detail. We will limit our discussion to resolution of the issues presented.

I.

It is sufficient for our purposes to note that this case arises out of the government's charge that Jasin and others engaged in a conspiracy to undermine and thwart the statutory and executive embargoes of weapons trade with South Africa. In reaction to the apartheid policies of South Africa, that country became the subject of an international embargo of weapons trade. That was effected in the United States by statutes and a subsequent executive order issued by President Ronald Reagan which by October 1986 prohibited all weapons related exports or imports with the regime.

International Signal and Control Corp. (ISC) and its subsidiary ISC Technologies, Inc. (ISCT), which were based in

Lancaster, Pennsylvania, were engaged in the international sale of weapons and weapons technology. Jasin was hired in 1984 by ISCT and was a senior vice president for marketing at ISCT from 1985 to March 1986. In March 1986, James Guerin, president and founder of ISC[1] promoted Jasin to president of ISCT, where he continued until April 1987 when he was demoted but remained with the company as a corporate vice president.

At trial, the government introduced evidence from which the jury could, and did, conclude that ISC and the government-owned Armaments Corp. of South Africa (Armscor) worked together to circumvent the arms embargo. Armscor subsidiary Kentron was specificaliy responsible for developing, testing, producing, and selling missiles. ISC brokered the sale of South African-made weapons and assisted Armscor in obtaining components. In fact, Guerin hired Clyde Ivy, previously of the South African companies, to be a director and officer of ISC.

The Striker was an anti-tank missile designed and built in South Africa. One of the specific weapons projects undertaken in the mid-1980s was brokering a sale of the Striker missile system and associated technology from South Africa to the People's Republic of China, which was particularly interested in having the Striker with helicopter launch capability. ISCT's role in the Striker program eventually encompassed (1) exporting U.S.-made components, including batteries and xenon bulbs, (2) importing a dummy Striker missile (no warhead) and

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[1] In December 1991, Guerin pled guilty to an eight-count indictment charging him with conspiracy, mail fraud, violation of both the Arms Export Control Act and the Comprehensive Anti-Apartheid Act, money laundering, securities fraud, and filing false tax returns. He was sentenced to fifteen years imprisonment.

rocket motors to qualify the system for helicopter launch, (3) importing missile technology data, and (4) exporting missile technology data. All of these activities were prohibited by United States statutes and the executive order referred to above.

There was evidence that Jasin was aware of or assisted each of these four activities. As Jasin himself outlined, development of helicopter-launch capability for the Striker required multiple phases in which there would be different tests for the impact on the helicopter itself. Jasin knew importation of the missile itself was banned. Ultimately, Jasin and ISC decided to test Striker on the U.S.-made Sikorsky helicopter, which would require bringing into the United States a dummy missile, canisters, and rocket motors. The success of this project would have resulted in a large commission for ISC.

As it turns out, the South Africans determined that the Striker missile had flight irregularities. Jasin undertook to arrange for wind tunnel testing of the missile in the United States. The testing involved the presence of South African engineers using British identity cards and the exchange of technological data. Although some of the testing related activities occurred after Jasin's demotion, the District Court concluded that Jasin had not withdrawn from the conspiracy. *United States v. Jasin*, No. 91-cr-00602-08, slip op. at 35-36 (E.D. Pa. July 7, 1993).

Although Jasin was indicted with eighteen other individuals and corporations, at Jasin's motion he was tried alone. The jury returned a verdict of guilty on December 10, 1992, on the conspiracy count, and not guilty on the remaining count charging the substantive offense of violating the Arms Export Control Act. Following a lengthy delay in sentencing, the court sentenced Jasin on July 16, 1998, to twenty-four months

incarceration, which represented a downward departure from the guidelines sentencing of sixty months. *United States v. Jasin*, 25 F. Supp. 2d 551, 556-57 (E.D. Pa. 1998). Jasin filed a timely notice of appeal.

On appeal, Jasin contends that the evidence was insufficient to support the verdict; that his due process rights were violated because the trial court refused to grant his motion for a bill of particulars; that there was a fatal variance between the conspiracy alleged in the indictment and the conspiracy proved at trial; that he is entitled to a new trial because the trial court improperly permitted certain testimony by a government handwriting expert, the trial court refused to charge the jury with respect to Jasin's value added defense, and the verdict was tainted by prosecutorial misconduct; and that it was error to apply the sentencing guidelines to him.

We reject each of these contentions. We consider each seriatim.

II.

A. Sufficiency of Evidence

We have articulated the test for reviewing a sufficiency of the evidence claim as follows:

> [A]n appellate court must sustain the verdict of a jury if there is substantial evidence, viewed in the light most favorable to the Government, to uphold the jury's decision. In determining whether evidence is sufficient, we will not weigh evidence or determine the credibility of witnesses.... The evidence need not be inconsistent with every conclusion save that of guilt, so long as it establishes a case from which a jury could find the defendant guilty beyond a reasonable doubt.

> A defendant challenging the sufficiency of the evidence bears a heavy burden.

United States v. Carr, 25 F.3d 1194, 1201 (3d Cir. 1994) (quoting *United States v. Casper*, 956 F.2d 416, 421 (3d Cir.1992)); *see also United States v. Rosario*, 118 F.3d 160, 162-63 (3d Cir. 1997).

Jasin argues that the District Court erred in its post-trial decision in evaluating his contention that the evidence was insufficient because the court considered only the government's evidence and not Jasin's. *See Jasin*, slip op. at 9. It is true that there appears to be some tension on this issue between our opinion in *United States v. Giampa*, 758 F.2d 928, 934-3 5 (3d Cir. 1985), which provides some support for the District Court's approach, and the general formulation of the sufficiency test as set forth in *United States v. Beck*, 615 F.2d 441, 448 (7th Cir. 1980). We note that cases in this court subsequent to *Giampa* do not expressly limit the trial court to considering the government's evidence on the motion for acquittal. *See Carr*, 25 F.3d at 1201; *United States v. Rieger*, 942 F.2d 230, 232 (3d Cir. 1991).

In any event, even if the District Court was too restrictive in its review of the evidence for purposes of the post-trial motion, both counsel have presented all of the relevant evidence before us for consideration of Jasin's insufficiency of the evidence argument. We consider that issue *de novo* and ask whether the evidence, taken in the light most favorable to the verdict winner, is sufficient to satisfy a reasonable juror of each element, properly construed, beyond a reasonable doubt. *See United States v. Stansfield*, 101 F.3d 909, 917 (3d Cir. 1996).

Jasin's principal argument is that the evidence was insufficient for conviction because he established at trial that he

relied in good faith on the advice of counsel regarding the importation of the missiles, and that this evidence demonstrated that the government failed to prove that he had the specific intent to violate the law. The government concedes that the crimes charged require proof of specific intent.

Arguably, the record could support Jasin's view as to his good faith belief. But the testimony and documents he refers to for support of his position do not lead ineluctably to the conclusion that he would have us draw. Indeed, Jasin may have been seeking a legal "subterfuge" to bring the embargoed materials into this country'. The issue of Jasin's good faith was a disputed one. The District Court did charge the jury with respect to Jasin's good faith, and the jury decided the issue against him. Viewing the evidence in the light favorable to the government, we cannot hold that the jury's decision was irrational. Hence, Jasin's proffered evidence of good faith does not provide a basis for us to find insufficiency of the evidence. Nor did the evidence he produced establish as a matter of law that he lacked specific intent.

Jasin then refers to a series of alleged errors that the District Court made in interpreting or understanding some of the evidence, and Jasin claims that there was insufficient evidence if these documents were correctly interpreted. Jasin had the opportunity to give the jury his interpretation of the exhibits at issue. We conclude that viewing the evidence as a whole, there was sufficient basis to affirm the jury's determination of guilt.

B. Bill of Particulars

Jasin contends that the District Court erred in refusing to grant a bill of particulars, given the scope of the conspiracy, and argues that as a result, his due process rights were impaired because he was unable to prepare and present a defense.

In March 1992, Jasin filed a motion for a bill of particulars raising seven matters, but withdrew four. The District Court denied his request for the remaining three, which sought the names of all persons or entities alleged to be participants under count 1, whether the term defendants in count 1 refers to or includes Jasin, and a statement of the government's theory of the relationship between Jasin and the substantive offense in count 24.

We have explained that a bill of particulars "inform[s] the defendant of the nature of the charges brought against him," and enables the defendant "to adequately prepare his defense, to avoid surprise during the trial and to protect him[self] against a second prosecution for an inadequately described offense." *United States v. Addonizio*, 451 F.2d 49, 63-64 (3d Cir. 1972) (quoting *United States v. Tucker*, 252 F. Supp. 305, 308 (S.D.N.Y. 1996)) (internal quotation marks omitted). We have stated that the bill "should be granted whenever an indictment's failure to provide factual or legal information significantly impairs the defendant's ability to prepare his defense or is likely to lead to surprise at trial." *United States v. Rosa*, 891 F.2d 1063, 1066 (3d Cir. 1989). However, the grant of a motion for a bill of particulars is within the broad discretion of the trial court which must balance the defendant's interests with, among other things, the danger of freezing the government's version of the facts. *Id.*

The District Court heard oral argument on Jasin's motion for a bill of particulars at which Jasin's counsel argued that he needed the bill to determine whether the government would seek to show one overall conspiracy or only the narrower Striker conspiracy. App. at 4224-25. The District Court stated that it believed that the government was required under the indictment to prove one conspiracy and to prove at least one of

the numerous charged overt acts in furtherance of the conspiracy. App. at 4225.

The government resisted providing the bill of particulars on the ground that Jasin sought details of proof and the government's specific theory of the case, which he was not entitled to receive. It argued that it had already provided him with the government's basic theory of the case. It argued further that where, as here, it was proceeding, *inter alia*, to hold Jasin liable for any of the substantive counts of his co-defendants under a theory derived from *Pinkerton v. United States*, 328 U.S. 640 (1946), it need not provide "a guide to what our theory of the case is as to what Mr. Jasin specifically did and weave our trial theory and give it to him so he can dissect it at this portion of the case." App. at 4248.

At argument, the District Court made clear that even if it denied the motion for the bill, the ruling would be without prejudice and the court would be willing to revisit the question. It appears that later that day, the court denied the motion for the bill without prejudice. Jasin does not assert that he raised the issue again at trial.

As we noted in *Rosa*, even where the record fails to reveal the trial court's reasons for exercising its discretion to deny the bill, the defendant still must show either surprise or other prejudice before we will reverse. 891 F.2d at 1067. Reviewing the record, we continued, in language as apt for this case as there,

> In this case, [the defendant] failed to show or, indeed, to claim a specific surprise or other prejudice. Neither before [this court], nor before the trial court in the post-trial proceedings did [the defendant's] counsel point to any "surprise" evidence or anything he would have done

> differently had he known earlier what he learned at trial. [Defendant's] brief asserts only that "[defendant] did not know the nature of the case and, thus, could not adequately prepare his defense." This would not warrant a reversal even if the denial of the bill of particulars was an abuse of discretion.

Id. (citations omitted). *See also United States v. Colson*, 662 F.2d 1389 (11th Cir. 1981) (defendant failed to present prejudice or surprise following trial court's denial of bill with names of unindicted co-conspirators).

Here, also, there is a general claim that Jasin had difficulty, but he has failed to identify "specific instances" giving rise to prejudice or surprise. Moreover, although the indictment does use the word "defendants" when referring to those charged with various parts of the conspiracy, which Jasin argues created difficulty because of its generality, he has not explained how he was prejudiced. While we believe the trial courts may be using overly strict standards in responding to a defendant's request for a bill of particulars, we cannot conclude that the District Court abused its discretion in this case.

C. Variance in the Conspiracies Charged and Proven

Jasin's next argument is that the government alleged one conspiracy but proved multiple conspiracies, an argument that runs through his appeal. The District Court rejected this argument in its post-trial opinion. *Jasin*, slip op. at 33.

In *United States v. Kelly*, 892 F.2d 255 (3d Cir. 1989), we adopted a three-part test to determine whether a series of events constitutes a single or multiple conspiracies:

> First, we examine whether there was a common goal among the conspirators. Second, we look at the nature of the scheme to determine whether the agreement contemplated bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators. Third, we examine the extent to which the participants overlap in the various dealings.

Id. at 259 (quoting *United States v. DeVarona*, 872 F.2d 114, 118-19 (5th Cir. 1989)) (internal quotation marks omitted).

The requirement that the government must prove a single, not multiple, conspiracies assures that a defendant is not "tried *en masse* for the conglomeration of distinct and separate offenses committed by others." *Id.* at 258 (quoting *Kotteakos v. United States*, 328 U.S. 750, 775 (1946)) (internal quotation marks omitted). However, "even a finding of a master conspiracy with sub-schemes does not constitute a finding of multiple, unrelated conspiracies and, therefore, would not create an impermissible variance." *Id.* (quoting *United States v. Smith*, 789 F.2d 196, 200 (3d Cir. 1986)) (internal quotation marks omitted). Moreover, as we later observed, "the absence of one [*Kelly*] factor does not necessarily defeat an inference of the existence of a single conspiracy." *United States v. Padilla*, 982 F.2d 110, 115 (3d Cir. 1992).

Many of the cases raising this issue have been conspiracies involving drug conspiracies, and although the evidence rarely showed a tightly knit cohesive group of conspirators or a singularity of purpose, we sustained the convictions after concluding there was sufficient evidence for the jury to find a single chain conspiracy. *See Kelly*, 892 F.2d at 260; *see also Padilla*, 982 F.2d at 114; *United States v. Salmon*, 944 F.2d 1106 (3d Cir. 1991).

Our research has uncovered only one other appellate case in which a defendant convicted of a conspiracy to violate the Arms Export Control Act contended there was a variance between the conspiracy charged and the evidence. The defendant in *United States v. Johnson*, 952 F.2d 565 (1st Cir. 1991), had been charged with conspiring to assist the Irish Republican Army from 1981-89. He argued that the evidence at trial established one conspiracy to export defense articles and services to perfect remote-controlled bombs, and another to build and export an anti-helicopter missile system. The court of appeals, although applying a different legal test than used in this circuit, noted that, at a minimum, the evidence demonstrated that the missile system on which the defendant worked "was simply the most recent in a series of projects undertaken by the conspirators to assist the [IRA] in its attacks against British interests in Northern Ireland." *Id.* at 580.

Using the *Kelly* test as a framework, we conclude that the evidence produced in this case supports the conclusion that there was only one conspiracy. Jasin does not contest that if the Striker program, which involved the import and export of defense material and services, and which involved importation and exportation of technical data relating to the missile, was illegal, then the program's goal matches that of the larger conspiracy to violate the embargo and the arms regulations. Appellant's Br. at 35.

Jasin appears to argue that because he lacked knowledge of and did not participate in the larger conspiracy to evade the South Africa arms embargo, he did not necessarily cooperate with the goal. However, Jasin's participation in the Striker program was advantageous to the larger conspiracy of avoiding the South African arms embargo. The mere fact that Jasin was not fully aware of every detail of the larger conspiracy because ISC generally compartmentalized its programs does not mean

that Jasin failed to cooperate. The jury could have concluded that Jasin was at least conscious of the fact that Striker was only a small part of a larger, ongoing activity.

Finally, Jasin asserts that there was very little overlap that was significant. However, the cases do not require that the type of significant overlap Jasin is demanding. As the court in *Padilla* noted, the presence of one central individual with some additional participation by another conspirator is adequate to meet the third Kelly factor.

As Jasin concedes, ISC president Guerin was involved in at least one meeting in which Striker was discussed and apparently had the authority to cancel the importation of the rocket motors. Ivy was involved in the attempt to import the rocket motors, even though he did not keep Jasin apprised of the details and he mislead Stehman to believe that the United States government had approved the imports. Moreover, both Guerin and Ivy participated in other activities circumventing the arms embargo.

As in *Padilla*, these activities by other ISC officers are sufficient to establish an overlap of participants in the conspiracy. We therefore reject Jasin's variance claim.

D. Grounds for a New Trial

Jasin raises three grounds for a new trial. As his first, he focuses on the testimony of FBI handwriting expert Mary Switaj who testified that Jasin "may have" signed under a different name one of the documents dealing with a contract proposal by ISC and who, he asserts, testified that Jasin's handwriting samples revealed "deception." It is, of course, the trial court's responsibility to determine whether an expert will testify to scientific knowledge and whether that testimony will

assist the trier of fact. *See* Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

Despite Jasin's repeated quotation of the word "deception," the FBI's handwriting expert never used this term. She categorized the information before her in several ways. Some pieces were "undictated known" samples, *i.e.*, written in the ordinary course of life, such as checks or a note to a friend; and others were "dictated known" samples, *i.e.*, written at the direction of investigators. She described the latter samples as either "distorted" or "disguised." She noted that no one writes the exact same way twice and defined "distorted writing" as changed from ordinary writing either intentionally or unintentionally and "disguised writing" as intentionally changed. Switaj declined to offer an opinion as to whether the distortion or disguise was intentional.

We cannot conclude that the court erred or abused its discretion in allowing Switaj's testimony that Jasin may have signed the documents; *see United States v. Hardrich*, 707 F.2d 992, 994 (8th Cir. 1983) (no abuse of discretion for trial court to admit testimony that some endorsements were made by defendant, some "may have been written" by defendant, others were not written by defendant, and still others probably were written by defendant), or that his handwriting was disguised or distorted, *cf. United States v. Flores*, 172 F.3d 695 (9th Cir. 1999), *petition for cert. filed* (June 28, 1999) (No. 99-5111).

Jasin's next contention for a new trial is based on the District Court's refusal to give the instruction Jasin requested on the added value of work performed by ISC's Italian division, Elmer. The gist of the instruction Jasin requested was that if the jury believed that Jasin demonstrated that the country of origin was Italy, not South Africa, because of the work that Elmer performed, then the importation of the items was permissible.

In *United States v. Coyle*, 63 F.3d 1239, 1245 (3d Cir. 1995), we stated:

> Generally, we review the district court's refusal to give certain jury instructions under an abuse of discretion standard although where . . . the question is whether the jury instructions stated the proper legal standard, our review is plenary.

Further, we have noted that "a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *United States v. Mosley*, 126 F.3d 200, 203 (3d Cir. 1997) (quoting *Mathews v. United States*, 485 U.S. 58, 63 (1988)).

The District Court held that the test Jasin proffered based on customs laws looks to the nature of the transformation—was it a substantial transformation?—not to the value added. The District Court further concluded as a matter of law that the evidence did not establish that there was a substantial transformation of the missiles that were routed through Italy from South Africa. The District Court reasoned that the article shipped from South Africa to Italy was a dummy missile or slug, and the article shipped from Italy to the United States was a dummy missile. Further, the court noted that of the first shipment often missiles from Italy, nine were dummies from South Africa that were unchanged in Italy and the tenth had some telemetry and additional items added in Italy. Thus, even accepting the evidence in the light most favorable to the defendant, the court concluded that, as a matter of law, no new and different article arrived from Italy. App. at 3189-90.

After reviewing the evidence to which the parties have directed us, we have no basis to overturn the District Court's conclusion that, as a matter of law, the evidence did not support

the conclusion that value was added or that there was a substantial transformation in Italy to the missiles.

We note that the court did provide the jury with full and complete instructions on Jasin's theory of the defense, and the relevant defenses themselves, *see* App. at 4400-02. We see no basis in this claim to direct a new trial.

Finally, Jasin claims that he is entitled to a new trial because of prosecutorial misconduct by the prosecutor's misrepresentation of the evidence regarding Jasin's contacts with ISC corporate counsel Gregory Mansker on which Jasin based his good faith defense in part. He focuses on the prosecutor's opening statement that "Jasin is covering his tracks at this point in time." He also complains about what he argues were inflammatory references to irrelevant material.

It may be that some of the prosecutor's statements were stronger than they should I have been, but we cannot hold that any were outrageous or suggested that the government had facts that could not be disclosed to the jury. It is the government's suggestion of undisclosed facts that is the basis of much of the appellate inquiry into alleged prosecutorial misconduct.

In deciding whether the prosecution has improperly commented at trial, the court should look to the overall context of the statements in the trial record. *United States v. Young*, 470 U.S. 1, 11 (1984); *accord United States v. Mastrangelo*, 172 F.3d 289, 297 (3d Cir. 1999). If the court finds that a comment was improper, it must apply a harmless error analysis for non-constitutional errors and look to see if "it is *highly probable* that the error did not contribute to the judgment." *United States v. Zehrbach*, 47 F.3d 1252, 1265 (3d Cir. 1995) (en banc) (quotation marks and citation omitted). The high

probability standard means "the court possesses a sure conviction that the error did not prejudice the defendant." *Id.* (quoting *United States v. Jannotti*, 729 F.2d 213, 219-20 (3d Cir. 1984)) (internal quotation marks omitted).

The prosecution mentioned Jasin's conversations with ISC'S counsel Mansker in both the opening and closing rebuttal statements. The Government observes in its brief that the evidence shows that Jasin failed to provide Mansker with all the information he had on the importation of motors and missile bodies; we cannot disagree. Further, we reject Jasin's complaint that the remarks in the opening and closing statements were so inflammatory and prejudicial that they violated Jasin's due process rights.

Accordingly, Jasin has not persuaded us that he is entitled to a new trial.

E. Applicability of Sentencing Guidelines

Finally, we consider Jasin's argument that the United States Sentencing Guidelines, which took effect on November 1, 1987, are inapplicable to him because his last personal involvement with the Striker program was in March 1987. The District Court found that the conspiracy did not conclude until after November 1, 1987. *Jasin*, 25 F. Supp. 2d at 557. Under *Pinkerton v. United States*, 328 U.S. 640 (1946), a conspirator may be found guilty for the substantive crimes of co-conspirators. Because Jasin was found guilty of the conspiracy count, and the conspiracy continued after the Sentencing Guidelines became effective, they are applicable to Jasin.

Although Jasin contended that he took affirmative steps to abandon the objectives of the conspiracy before November 1,

1987, the issue was presented to the jury which obviously found otherwise. The District Court upheld the jury's determination, holding that "[t]he evidence, viewed in the light most favorable to the Government, is sufficient to establish that *Jasin* did not withdraw from the conspiracy." *Jasin*, slip op. at 35-36; *accord Jasin*, 25 F. Supp. 2d at 557. We have reviewed the evidence and have no reason to disagree with the District Court's determination.

III.

For the foregoing reasons, we will affirm the judgment of conviction and sentence.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 98-164 1

UNITED STATES OF AMERICA

v.

THOMAS JASIN
Thomas P. Jasin,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 91-cr-00602-8)
District Judge: Hon. Jan E. DuBois

Before: SLOVITER, NYGAARD and McKEE,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued on July 26, 1999.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the District Court entered July 17, 1998, be, and the same is, hereby affirmed.

Attest:

/s/ [illegible]

Chief Deputy Clerk

Dated: August 12, 1999

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

91-00602-08

UNITED STATES OF AMERICA

v.

THOMAS JASIN

MEMORANDUM

DUBOIS, J. JULY 7, 1993

This case is before the Court on the motion of defendant, Thomas Jasin ("Jasin"), for Post Conviction Judgment of Acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure.[1] Jasin bases his Motion on the

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[1] Jasin also filed a Motion for New Trial pursuant to Federal Rule of Criminal Procedure 33. That Motion was denied by Order dated March 12, 1993, on the ground that the Motion was not filed within seven (7) days after return of the guilty verdict or within the extension of that time period granted by the Court. See Federal Rule of Criminal Procedure 33. The time limit for filing a motion for a new trial under Federal Rule of Criminal Procedure 33 is jurisdictional and the Court is powerless to entertain such motions unless the motion is filed within the requisite time period. *United States v. Coleman*, 811 F.2d 804, 807 (3d Cir. 1987), *cert. denied*, 490 U.S. 1070, 109 S. Ct. 2074 (1989); *United States v. Di Bernardo*, 880 F.2d 1216, 1223 (11th Cir. 1989).

(continued...)

following: (a) the evidence was insufficient to support his conspiracy conviction; (b) the Government's proof reflected a series of conspiracies as opposed to the single conspiracy charged in the Indictment; and (c) the statute of limitations expired as to Jasin prior to indictment because of his early withdrawal from the conspiracy. For the reasons set forth below, the Court will deny the Jasin's Motion for Judgment of Acquittal.

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[1](...continued)

The sequence of events that led the Court to deny Jasin's Motion for New Trial may be summarized as follows

Jasin was found guilty by the Jury on December 10. 1992. On December 17, 1992, upon Jasin's application, the Court granted an extension of time for filing post-verdict motions to January 4, 1993. On January 5, 1993, the Court, again on Jasin's application, granted Jasin an additional extension of time to January 11, 1993, within which to file such motions, but Jasin failed to do so. Jasin's Motions for New Trial and for Judgment of Acquittal were not filed until February 1, 1993.

A different rule applies to motions for judgment of acquittal. With respect to such motions, the timeliness of the filing is not jurisdictional. and a court is given discretion to consider reasons for an untimely filing and accept a late filed motion. *Coleman*, 811 F.2d at 807. The Court, in the exercise of its discretion, by Order dated March 12, 1993, decided not to deny the Motion for Judgment of Acquittal on the ground that it was not timely filed.

I. THE INDICTMENT

On October 31, 1991, a grand jury in the Eastern District of Pennsylvania returned a sixty-seven (67) count Indictment against nineteen (19) co-defendants, including Jasin.

Jasin was charged in three (3) counts of the Indictment. Count One charged a conspiracy to violate the Arms Export Control Act, 22 U.S.C. §§ 2778(b)(2) and 2778(c) and its implementing regulations 22 C.F.R. § 121, *et seq.*; the Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. § 5001 *et seq.*; and sections of a money laundering statute, 18 U.S.C. § 1956. Count Twenty-Three charged a violation of the Arms Export Control Act; it was voluntarily dismissed by the Government before trial. Count Twenty-Four charged a violation of the Arms Export Control Act on or about August, 1987.

Count One of the Indictment charged that it was the plan of the conspiracy for International Signal and Control Corporation ("ISC"), a United Kingdom corporation with its headquarters in Lancaster, Pennsylvania, to aid defendant Armaments Corporation of South Africa Ltd. ("Armscor") in evading the United Nations arms embargo of the Republic of South Africa ("South Africa") by exporting United States made munitions and technology to Armscor, so that Armscor could enhance its inventory and market weapon systems to third world countries. (Count One, paragraph 48) It was further charged that it was part of the conspiracy to assist South Africa in importing into the United States missile components for testing and evaluation to further a joint ISC/Armscor missile program aimed at sales to the Peoples Republic of China ("China"). (Count One, paragraph 55) This program was known as the "Striker missile program."

Count Twenty-Four of the Indictment charged that on or about August, 1987, Jasin exported and aided an abetted the exportation, from the United States to South Africa, of defense articles and services, that is transfer of missile flight technical data and technology, which were designated as defense articles and services on the United States Munitions List, without having first obtained from the United States Department of State ("State Department") the required license or written authorization for such export.

Defendant Armscor, a state owned armaments corporation, was developed by South Africa as its independent arms industry in response to the United Nations arms embargo of South Africa. Armscor is responsible for meeting South Africa's armament needs through procurement, development, manufacturing, and international sales. Defendant Kentron Pty. Ltd. ("Kentron") is a subsidiary of Armscor.

ISC was primarily engaged in the design, manufacture, sale and brokering of sales of medium to high technology electronic military equipment and systems for domestic and international customers. Between 1971 and 1982, ISC was a privately held corporation, the majority of its stock owned by James H. Guerin. Since 1982, there have been numerous successor corporations to ISC, and Guerin has been an officer and director of the successor corporations, including Chief Executive Officer of International Signal and Control Group PLC ("ISC Group PLC") and Chairman of Ferranti International Signal, Inc. ("FISI"), as well as Deputy Chairman of Ferranti International, FISI's parent corporation.

Defendant Robert Clyde Ivy served as a director and officer of ISC from 1980 to 1989, including Director and Chairman of he [sic] Board of ISCT, President of ISC, Chief

Executive Officer of ISC International, a division of ISC Group PLC, and a director of Ferranti International.

Jasin was Vice President of International Marketing of ISC Technologies, Inc. ("ISCT"), a subsidiary of ISC, from July, 1984 to March, 1986, when he became President of ISCT. In these capacities, Jasin supervised international marketing of weapons as well as weapons programs for ISC and headed the Striker missile program. Jasin was demoted as President of ISCT in March, 1987, but he continued to be employed at ISC.

On December 10, 1992, after a five (5) week trial, the jury returned a verdict of guilty on Count One of the Indictment and not guilty on Count Twenty Four of the Indictment.

II. BACKGROUND

In 1963, pursuant to United Nations Resolution 181 calling for all states to cease shipment of arms to South Africa, the United States implemented an arms embargo: with respect to South Africa, prohibiting the sale of items for use in combat or training by the military or police. Beginning in 1978, the United States has strictly enforced the United Nations arms embargo, issuing regulations pursuant to the Arms Export Control Act ("AECA"), 22 U.S.C. § 2778 *et seq.*,[2] which

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[2] 22 U.S.C. § 2778 provides in pertinent part:

(a)(1) In furtherance of world peace and the security and foreign policy of the United States, the President is authorized to control the import and export of defense articles and defense services and to provide foreign policy guidance to persons of the United States involved in the export and import of such articles and services. The President is authorized to designate those items which shall be considered as defense articles and defense services for the purposes of this section and to promulgate regulations for the import

(continued...)

prohibits the import or export of military articles without the required license or written authorization for such imports or exports. By Executive Order effective October, 1985 ("Executive Order"), President Ronald Reagan barred the importation into the United States of defense articles and services originating in South Africa. The Comprehensive Anti-Apartheid Act ("CAAA"), 22 U.S.C. § 5001 *et seq.*,[3] prohibiting the import of defense articles and manufacturing data from South Africa, and the export of defense articles and technology to South Africa, became effective in October, 1986. Thus, prior to October, 1986, the import or export of defense articles and services to and from South Africa required a license

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[2](...continued)
arid export of such articles and services. The items so designated shall constitute the United States Munitions List...

(b)(1)(A) As prescribed in regulations issued under this, every person...who engages in the business...of exporting any defense articles or defense services designated by the President under subsection (a) (1) of this section shall register with the United States Government agency charged with the administration of this section, and shall pay a registration fee which shall be prescribed by such regulations.

(b)(2) Except as otherwise specifically provided in regulations issued under subsection (a)(1) of this section, no defense articles or defense services designated by the President under subsection (a)(1) of this section may be exported or imported without a license, for such export or import, issued in accordance with this chapter and regulations issued under this chapter....

(C) Any person who willfully violates any provision of this section or section 2799...or any rule or regulation issued under either section...shall upon conviction...be imprisoned not more than ten years....

[3] 22 U.S.C. § 5001 states in pertinent part:

...no article which is grown, produced. manufactured by. marketed, or otherwise exported by a para-statal organization of South Africa may be imported into the United States....

or written authorization. As of October, 1986, United States law prohibited the import of South African defense articles and services and the export of defense articles and services to South Africa.

The Indictment in this case describes a long-term conspiracy between Armscor and ISO to break the arms embargo of South Africa. Armscor and Kentron established front companies, including Tool Techniques and African Technical Services ("ATS"), to conceal their procurement activity. ISC, under the direction of Guerin and Ivy, worked with Armscor, Kentron, and their front companies to import and export to and from South Africa millions of dollars of defense articles and services.

The Striker missile program contemplated the sale to China of a South African missile made with United States components and technology. ISC was to receive a 35% commission from South Africa on a contract expected to be valued at $300 to $500 million. The Striker missile program was to be portrayed publicly as the sale by ISC of a European developed missile. The transfer of components and technical data was to be accomplished without obtaining any required State Department licenses.

The missile, however, had certain operational problems-flight irregularities which caused the missile to crash when launched from the ground-which had to be corrected before China would agree to purchase the system. In addition, China wanted the missile qualified for helicopter launch capability. To correct the missile's operational problems, and to satisfy Chinese demands for helicopter launch capability, ISC made plans to test the missile in the United States so as to qualify it for helicopter launch and enable Armscor and Kentron to rectify its operational problems through the exchange of

technical data between South Africa and ISC. The missile was never qualified for helicopter launch capability, but was tested at the Calspan Wind Tunnel facility ("Calspan") in Buffalo, New York, in August, 1987. For reasons not stated at trial, China did not enter into a contract with South Africa for the purchase of the Striker missile.

III. SCOPE OF REVIEW

In ruling on a post-trial motion for judgment of acquittal based upon the alleged insufficiency of the evidence, the Court must determine whether, viewing the evidence most favorably to the Government, there is substantial evidence to support the jury's guilty verdict. *United States v. Wexler*, 838 F.2d 88, 90 (3d Cir. 1988). The Court

> must view the evidence in the light most favorable to the verdict, and must presume that the jury has properly carried out its functions of evaluating credibility of witnesses, finding the facts, and drawing reasonable inferences. A verdict will be overruled only if no reasonable juror could accept the evidence as sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt.

United States v. Coleman, 811 F.2d 804, 807 (3d Cir.1987), *cert. denied*, 490 U.S. 1070, 109 S. Ct. 2074 (1989) (quoting *United States v. Campbell*, 702 F.2d 262, 264 (D.C. Cir. 1983)) (citations omitted); *see also United States v. Furst*, 886 F.2d 558, 565 (3d Cir.1989), *cert. denied*, 493 U.S. 1062, 110 S. Ct. 878 (1990); *United States v. Aguilar*, 843 F.2d 155, 157 (3d Cir.), *cert. denied*, 488 U.S. 924, 109 S. Ct. 305 (1988); *United States v. Ashfield*, 735 F.2d 101, 106 (3d Cir. 1984), *cert. denied*, 469 U.S. 858, 105 S. Ct. 189 (1984); *United States v.*

Martorano, 596 F. Supp. 621, 624 (E.D. Pa. 1984), *aff'd* 767 F.2d 63 (3d Cir. 1985).

In deciding whether to enter judgement of acquittal, the district court may not weigh the evidence, nor is it permitted to make credibility determinations, which are within the domain of the jury. Rather, the court is confined solely to its judgment of the sufficiency of the Government's evidence as to each element of the offenses charged and submitted to the jury for deliberation and verdict. *United States v. Giampa*, 758 F.2d 928, 934-35 (3d Cir. 1985); *United States v. Beck*, 615 F.2d 441, 448 (7th Cir. 1980).

IV. GOVERNMENT'S EVIDENCE AT TRIAL

The Government offered the following evidence at trial.

A. Evidence of Conspiracy

The Government presented evidence establishing the following: (1) an Armscor - ISC conspiracy to assist South Africa in evading the United States arms embargo of South Africa, which included the Striker missile program; (2) Jasin knowingly and willfully joined the conspiracy with an awareness of at least some of the basic aims and purposes of the unlawful agreement and with knowledge of the law regarding the export and import of defense articles and services to and from South Africa; and (3) acts committed in furtherance of the conspiracy by Jasin and others.

1. *Armscor - ISC Conspiracy*

The Government presented the testimony of witnesses who were ISC officers and employees—Terrance Faulds,

Gerald Schuler, Sandra Stehman and Robert Shireman—and introduced numerous documents establishing a core conspiracy between Armscor and ISC to assist South Africa in evading the United States arms embargo. Faulds, who was the director of ISC's manufacturing support division, testified that certain ISC officers and employees assisted Armscor and its subsidiaries in circumventing the United States arms embargo of South Africa. Faulds detailed the long-term relationship between Armscor and Guerin and Ivy. Faulds explained that he was not involved in all facets of the conspiracy, but that Ivy was the common denominator to South African related activities at ISC. According to Faulds, Ivy solicited various ISC employees to assist him accomplish the goal of the conspiracy-breaking the arms embargo of South Africa.

Faulds testified that under Guerin's and Ivy's direction and guidance, ISC exported to South Africa millions of dollars of United States munitions list items, including components that were integrated into the Striker missile, without requisite State Department licensing. Faulds further testified that in addition to the export of components, ISC engaged in the export of complete systems such as the film reader and telemetry antenna, and in the wind tunnel testing of the Striker missile. (Direct testimony 11/6/92)

Faulds' testimony was corroborated by co-conspirator Schuler, who was responsible for and controlled the brokerage and exportation of products to ISC's foreign customers, co-conspirator Stehman, an ISC employee who was responsible for ISC compliance with import/export requirements and for obtaining import licenses, and co-conspirator Shireman, a financial officer of ISCT.

2. *Striker Missile Program - Jasin's Knowing and Willful Membership in the Conspiracy*

The Government presented evidence establishing that the Striker missile program was part of the single conspiracy alleged in Count One of the Indictment, that Jasin was a member of the conspiracy, having knowingly and willfully joined the conspiracy, and that Jasin knowingly violated the laws of the United States. The Government's evidence showed that the Striker missile program involved illegal activity in the following three areas, in all of which Jasin was involved:

1) the illegal export of United States origin, components, including the UVP lamp bulb and Eagle Picher battery, to Armscor and Kentron for integration into the Striker missile;

2) the illegal import from South Africa to the United States, through Italy, of Striker missile parts - missile bodies, launch canisters, a cut-away model - and the attempted import of rocket motors, for testing in the United States to qualify the missile for helicopter launch;

3) the illegal import of South African technology and manufacturing data necessary for the wind tunnel testing at Calspan and the illegal export of technical data and defense services resulting from wind tunnel testing at Calspan.

a. *Jasin's Knowledge of Applicable Law*

The Government presented evidence establishing that, at the time he committed acts in furtherance of the conspiracy, Jasin was aware of the law regarding the export and import of defense articles and services to and from South Africa as set forth in the AECA and the Executive Order. In September, 1985, ISC licensing expert James Fluhr sent Jasin a copy of the Executive Order. (Exh. G-686) In a September 13, 1985 letter to Jasin, Fluhr notified Jasin that the Executive Order would "implement a U.N. resolution banning import of South African

Arms." (Exh. G-42.5) Fluhr provided Jasin with information on the AECA in December, 1985. (Exh. G-55) On June 13, 1986, prior to the trans-shipment of South African missile components from South Africa to the United States through Italy, Fluhr sent Jasin a memorandum in response to Jasin's inquiry as to "when and how restrictions were placed on the import of military goods from South Africa." (Exh. G-195) In that memorandum, Fluhr advised Jasin that in 1963 the State Department instituted a ban on arms sales to South Africa, and that effective October 11, 1985, for South Africa all defense articles and technical data on the U.S. munitions list are now on the munitions list for import. Fluhr wrote "it is the policy of the U.S. to deny licenses and other approvals with respect to defense articles, and technical data relating to defense articles, from South Africa. That is, an import permit is required, but won't be given." (Exh. G-195) On July 2, 1986, Fluhr faxed Jasin a second copy of the June 13, 1986 memorandum.

b. *Export of United States Components in Violation of AECA*

The Government presented evidence establishing that United States components were illegally exported to South Africa for integration into the Striker missile. Faulds testified that UP lamp bulbs and Eagle Picher batteries were exported by ISC to South Africa for integration into the Striker missile without required State Department licensing. Steven Banks, Jasin's program manager for the Striker missile, testified that in late 1986 he observed the UVP lamp bulb in the Striker missile at a Kentron facility in South Africa.

The Government further presented evidence establishing that in October, 1986, after Fluhr had instructed Jasin about the applicable United States law concerning import and export of defense articles and services to and from South Africa, Jasin

knew that ISC's Striker program included illegally exporting United States components for integration into the missile. On October 25, 1986, Banks faxed Jasin from South Africa, advising that Armscor wanted ISC to buy for South Africa, as ISC had done in the past, components for the Striker including lamps, thermal batteries and gyros. (Exh. G-304) Banks also testified to his conversations with Jasin about South Africa's request for United States components.

In December, 1986 , Jasin received a Striker program "letter of intent," sent by Kentron officer Vein Davis, to be executed by ISC. (Exh. G-332) A memorandum attached to the "letter of intent" stated that the contract pricing terms were based "on the assumption that a substantial number of imported components" would be supplied by ISC. The Government offered evidence that on the same day a letter of intent with South Africa, adopting the terms submitted by Davis, was signed by someone using the fictitious name E.M. Blumenthal and a fictitious entity Technology Associates International (TAI) , Belgium ("TAI"). (Exh. G-334) The Government's handwriting expert, Mary, a Special Agent with the Federal Bureau of Investigation ("F.B.I."), testified that when comparing the signature on the letter of intent with a known exemplar of Jasin's signature, it was her opinion that Jasin "may have signed" the "letter of intent" with South Africa (Exh. G-334), but she could not say he "probably signed it."

Moreover, in a July 25, 1986 memorandum from Jasin to Guerin, Jasin acknowledged the legal "risk" associated with the Striker missile program in the event that the source for key components in the missile were to be exposed. (Exh. D-81) On cross-examination, Jasin admitted his knowledge of the illegal export of components, but claimed a good faith belief that, based on Guerin's representations to him, this activity was "authorized."

c. *Import of Missile Parts in Violation of AECA*

The Government presented evidence establishing that beginning in early 1986, Jasin and his co-conspirators engaged in a scheme to import illegally into the United States through Europe missile parts, including missile bodies, launch canisters, a cut-away model and rocket motors, by disguising the South African origin of the missile components. This scheme was developed after Fluhr had advised Jasin of the Executive Order banning the import of South African arms, and after a United States intelligence agency had rejected Jasin's November, 1985 overture for assistance in the importation of the Striker missile. (Exh. G-674, 675)

In February, 1986, Jasin invited Paul Bester and five other South Africans to ISC on March 10, 1986 to "discuss business opportunities." Bester, a Kentron employee, worked for the front company ATS. Jasin asked Bester to "bring with you the 5 technical people from your company with whom I had meetings last month." (Exh. G-80) On March 10 and 11, 1986, Jasin hosted a meeting at ISC with representatives from Sikorsky and five South Africans, including Bester and Kentron engineers Johan Lombard and John Victor.

On March 11, 1986, Jasin was advised in a fax from Anthony Penna, an ISC employee in the United Kingdom, that there was a problem in the proposed routing of Striker missile parts through England due to an United Kingdom embargo adopted in late November, 1985. Penna wrote "have you looked into possibility of Italy?" (Exh. G-100) In an attached memorandum, it is stated that if the original South Africa paperwork were to accompany the missile parts to the United

States, this would present a problem with entry into United States.

In March, 1986, defendant Wayne Radcliffe, who served in various executive positions at ISC from 1974 through November, 1989, including Vice President of ISC and Vice President of Special Projects, sent Jasin a memorandum, requesting information needed to import and store rocket motors, including the name of the supplier. (Exh. G-91) Jasin gave the memorandum to Bester, requesting handwritten answers to Radcliffe's questions. Bester wrote that the supplier of the rocket motors was Douglas, Cochrane, Sons and company, SA ("DCSC"). Stehman testified that she received this memorandum from Jasin after she was solicited by Jasin and Ivy to assist in the import scheme. Jasin gave her Davis' name and instructed her to arrange importation of the rocket motors and other missile parts.

On March 27, 1986, Jasin wrote to Lombard, asking confirmation that DCSC was the supplier/sender of the rocket motors and other missile components that were to be imported to the United States through Europe. Jasin explained to Lombard that the Italian company Elmer ("Elmer") would "import on temporary basis and re-export to ISC." (Exh. G-111) On April 4, 1986, Jasin received a telex from Guido Ricciardi of Elmer confirming that South Africa was the sender of the shipment to Elmer, and that one shipment, consisting of a cut-away model, aluminum shells in canister and launch canisters, was to be sent from South Africa by air and another shipment, consisting of rocket motors, was to be sent from South Africa by ship. (Exh. G-115)

Schuler testified about the planned illegal trans-shipment of the rocket motors. (N.T. 11/17/92) He stated that in a meeting with Guerin, Radcliffe and Jasin at ISC in the spring of

1986, Jasin and Radcliffe explained that ISC needed to import prohibited missile parts from South Africa through Italy, because direct import from South Africa was prohibited. Schuler was enlisted to hire the vessel for shipment of the rocket motors. Jasin and Ivy also assigned Stehman to arrange the details of the shipments, prepare required paperwork and coordinate shipments with Schuler. Schuler testified that the import scheme was prohibited by law. Stehman also confirmed in her testimony that the import was prohibited by law.

Jasin's involvement in the illegal importation of the missile components into the United States was further established by a series of faxes between Jasin and Elmer. On April 8, 1986, Jasin instructed Elmer that

> Any material from the south to come here should not have any ISC names on it. Our friends down south have been instructed that anything coming to me should read "pass onto management" . . . the motors must be taken out of customs. It is imperative that they not be shipped to U.S. until after they have been in the possession of Elmer. Having the shipping agent take care of labeling and documentation in the warehouse is not advisable.

(Exh. G-117) The following day, Ricciardi telexed Jasin that Elmer was ready to receive shipment. As to the rocket motors, Elmer would arrange for a "friendly" company to handle the import, storage and export. Ricciardi advised "[w]e will manage and direct everything but Elmer and your name will not be involved." (Exh. G-119) Jasin provided this memorandum to Stehman. Jasin telexed back to Ricciardi "received your fax of 4/9/86. Thanks for your creativity. I concur with plan." (Exh. G-121).

On April 17, 1986, ISC, through Stehman, submitted an import permit application to the Bureau of Alcohol, Tobacco and Firearms ("ATF"), with James Fluhr's signature on it, for the cut-away display model of the Striker missile and display stand. The application falsely reported that the foreign seller was Elmer. (Exh. G-137) On May 4, 1986, the cut-away model and display stand were imported into the United States.

On April 23, 1986, Fluhr sent a memorandum to Jasin with a draft Striker "technical assistance agreement" and letter to the State Department. The draft represented to the State Department that ISC "intends to join 3 companies in UK, Italy and France to develop a laser guided, helicopter launched, anti-armor missile system . . . primary development responsibilities will rest with ISCT in UK . . . it is essentially a European development . . . the technical data or defense service exported from the US . . . may not be transferred to a person in a third country except . . . prior approval of Department of State." (Exh. G-179) The partners to the transaction were reported to be ISC, Elmer and SFIM, a French company. Jasin did not tell Fluhr that South Africa was a participant in the Striker missile program, and that South African participation was essential.[4]

On May 23, 1986, Jasin invited Lombard to ISC in Lancaster, Pennsylvania, on May 26, 1986 for two weeks. ISC's records showed that Lombard and his associates were at ISC during that time. On May 29, 1986, Stehman submitted

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[4] On July 21, 1986, ISC again submitted a technical assistance agreement to the State Department misrepresenting the Striker program by stating that ISC was a partner in "essentially a European technical development. South Africa's role in the program was never disclosed to the State Department. (Exh. G-281.2)

another permit application to ATF for the import of 24 canisters for carrying anti-tank missiles. The permit application falsely stated that Italy was the country of origin. (Exh. G-182) Again, on June 23, 1986, ISC submitted a permit application to ATF for import of missile rocket motors, falsely stating Belgium was the country of origin and TAI the manufacturer. (Exh. G-199) The launch canisters arrived in the United States from Italy on August 11, 1986.

The Government introduced evidence that the missile testing that Jasin planned at Wright Malta required the importation of rocket motors from South Africa. Stehman testified that by the end of the summer of 1986, she refused to participate any further in the scheme to import the rocket motors. At that time, she called Ivy, who was in South Africa with Jasin, and told Ivy not to bring the rocket motors into South Africa. Jasin called Stehman that day from South Africa, asking "how soon can you get the motors to the U.S.", and instructing her to bring the rocket motors into the United States as soon as possible. According to Stehman, Jasin never instructed her to stop the importation of the rocket motors. One or two days later, Stehman notified former ISC officer Stewart Pindell of the plan to import rocket motors, asking him to get Guerin to intervene to prevent the import of the rocket motors. The rocket motors were never shipped to the United States.

The Government also introduced evidence that after the enactment of the CAAA on October 2, 1986, ISC and Sikorsky terminated the missile testing planned for Wright Malta. On cross-examination of Jasin, the Government elicited testimony that on October 8, 1986, Jasin met with Guerin's attorney to explore the possibility of using Guerin's farm in Lancaster for the missile tests. The missile tests were never conducted. The government further introduced evidence showing that numerous international monetary transactions, involving the transfer of

funds from ISC to Elmer to promote the illegal importation of missile components, were conducted at Jasin's direction and supervision. (Exh. G-259, 279, 284, 337, 392, 393, 394).

d. Transfer of Technology in Violation of AECA and CAAA

The Government presented evidence that after the missile components entered the United States and subsequent to the cancellation of the Sikorsky testing, Jasin and his co-conspirators continued their illegal activity by attempting to use the South African missile components already imported to the United States to remedy flight irregularities that were sufficiently serious to warrant concern that the operational problems might derail the China contract.

In the fall of 1986, Jasin recruited Tom Ban to work on the Striker program. Through Calspan records and the testimony of Calspan employee Richard Weisinger, the Government established that on October 15, 1986, Jasin contacted Calspan by telephone and made an inquiry regarding a missile with flight problem. (Exh. G-296)

On November 13, 1986, Jasin received a fax from Lombard, a "statement of work" for wind tunnel tests. The statement of work discussed the problems, testing, test preparation, design phase, test execution phase and analysis of test results. Lombard wrote that "full scale hardware must be used as wind tunnel models." Lombard set forth a four phase approach and detailed the role of South Africans:

> a team must also be in your country during the executing period. Their purpose would be to consult with your people on a daily basis to review the test results as they become available, and take corrective

> action as needed... As you might well understand, the completion of our work is very urgent, as the problem not only effect our local programma, but the effect on our joint venture is just as serious.

(Exh. G-318)

On December 19, 1986, Jasin telephoned Calspan regarding planned testing. (Exh. G-330) In January, 1987, Jasin, through his secretary, again contacted Calspan, this time to set up a meeting for February. (Exh. G-349) On January 21, 1987, Jasin requested that his secretary make hotel reservations for the South Africans. Jasin provided his secretary with a fax from Lombard requesting false business cards for the South Africans, stating "all arrangements for our visits as previously arranged are now finalized . . . please arrange for business card for third person Nic Becker (Phd) ("Becker") senior engineer, aerodynamics. We assume present business cards for ISC Ltd-ok for other 2 persons." (Exh. G-357)

Other documents received in evidence established South Africa's need for the testing and for the South African presence in the United States to assist in the development of the test plan and its implementation. Prior to the Calspan meeting in February, Lombard wrote to Jasin "our present problem has serious implications for our mutual programme . . .without your help our capability of solving this problem is seriously impaired . . . our exposure can be minimized during any contact by a few simple steps, i.e. business cards. [sic] choice of venue (i.e. Lancaster), etc. . . [sic] Find attached our specifications to serve as baseline for forthcoming discussions." (Exh. G-358) Shortly thereafter, Jasin mailed to Calspan a "preliminary requirements document to serve as guideline for discussion of 2/3/87 to correct the missile's aerodynamic behavior" and stated "10 units are available for testing." (Exh G-367) On February

3, 1987, Jasin and Kentron engineers Lombard, Victor and Becker visited Calspan. (Exh. G-371) Jasin misled Calspan about the identity of the South Africans, identifying them as citizens of the United Kingdom and ISC employees.

After the meeting, on February 5, 1987, Jasin wrote to Calspan sending a "complete data package" of prints, specifications and technical data originating in South Africa and disassembled and cut pieces of hardware which had been illegally imported from South Africa. (Exh. G-380) Jasin requested a price quote for wind tunnel testing from Calspan. Jasin assigned Bain to follow through with the wind tunnel tests.

Clyde Bryant, an expert witness, testified that the Striker Calspan test program and other information provided to Calspan by Jasin in early 1987 was technical data which could not be transferred without violating the AECA and the CAAA. The Government also established that the wind tunnel tests were conducted in August of 1987, with South Africa engineers reviewing the test results. This transfer of missile flight technical data and technology was the subject of Count Twenty-Four of the Indictment. Through the testimony of Shireman and Faulds, and ISC records, the Government established that Armscor, through a front company Tool Techniques, paid in excess of $350,000 for the testing. (Exh. G-397, 401.3, 403, 457, 472, 474, 475, 477, 510, 543, 544)

B. Withdrawal from Conspiracy

The Government presented evidence establishing that Jasin's did not withdraw from the conspiracy -- that his assistance to Armscor with Calspan came in spite of resignations from the program by ISC employees Scott Wagner and David Ellis, and a plea from Stehman that the missile

components be destroyed due to their illegal importation. The Government's evidence also established that after Jasin's demotion as President of ISCT in March, 1987, he took no affirmative acts to stop the transfer of windtunnel technical data or to inform the Government of ISC's violations of the law . The Government's evidence showed that in July, 1987, Jasin wrote to Guerin, noting that Jasin kept Striker going strong at ISC "despite lack of credentials, lack of engineering resources, and the occasional insinuation from my management of its hopelessness and perhaps should be dropped" and concluding that he felt "good about being at ISC, a remarkable company." (Exh. G-514)

V. DISCUSSION

A. Sufficiency of the Evidence - Conspiracy Count

Jasin argues the evidence is insufficient to support his conspiracy conviction because the Government did not prove that Jasin voluntarily joined the Armscor - ISC conspiracy charged in Count One or had the specific intent to violate the AECA, the CAAA or any money laundering statute. Specifically, Jasin contends the evidence does not establish that he had the "specific intent to do an illegal act in violation of a known legal duty" in connection with the importation of Striker missile parts, or that he had the "specific intent to join the charged conspiracy." In support of his position, Jasin argues that the Striker missile program, unlike the other activities in furtherance of the conspiracy, was "a legitimate business program that was absolutely legal in its objective." (Memorandum in Support of Motion for Post Conviction Judgment of Acquittal at 25) According to Jasin, the Striker missile program shared neither a "unity of purpose," nor a common plan or method of implementation, nor common participants with the illegal activities in furtherance of the

conspiracy. (Memorandum in Support of Motion for Post Conviction Judgment of Acquittal at 9) Jasin also argues that he was not even aware that a conspiracy existed. (Defendant's Reply to Government's Supplemental Response Regarding Post-Trial Motion at 8)

Jasin further argues that he lacked the specific intent to violate the underlying statutes because, after consulting with ISC counsel, he believed and relied on the advice of counsel that the importation of missile components was legal if there was "value added" or "substantial enhancement" to the components in Italy, which, according to Jasin, occurred when telemetry, weight and balance were added to the launch canisters.[5] Jasin maintains that he only pursued testing of the Striker missile in the United States, rather than in Italy, after receiving ISC counsel's advice. (Jasin's Memorandum in Support of Motion for Post Conviction Judgment of Acquittal at 7-9)

To sustain a conviction for a conspiracy in violation of 18 U.S.C. § 371, the Government must establish all of the elements of the crime charged, which are: (1) that two or more persons entered the unlawful agreement charged in the Indictment from in or about 1978 to in or about September, 1989; (2) at some time during the existence of the conspiracy, Jasin knowingly and willfully joined the conspiracy with an awareness of the essential nature of the unlawful agreement; (3) at some time during the existence of the conspiracy, one of the members of the conspiracy committed one or more acts in furtherance of the agreement. To sustain a conviction for

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[5] The Court concluded at trial that the advice of counsel was wrong as a matter of law and that the enhancements to the missile components in Italy were not substantial, both conclusions disputed by Jasin. *See* Jasin's Memorandum in Support of Motion for Post Conviction Judgment of Acquittal at 7 - 9.

conspiracy to violate the AECA, the CAAA, or the money laundering statute, the Government must prove Jasin had the specific intent to violate the underlying statutes.

Although the elements of a conspiracy may be proven entirely with circumstantial evidence, "the sufficiency of the evidence in a conspiracy prosecution requires close scrutiny." *Coleman*, 811 F.2d at 804 (citing *United States v. Cortwright*, 528 F. 2d 168, 171 (7th Cir. 1975)). Slight evidence of a defendant's connection with a conspiracy is insufficient to support a guilty verdict. *Id.* However, a defendant may be a member of a conspiracy even though he "did not himself know all the details, goals, or other participants of the broader conspiracy. . . ." *United States v. Theodoropoulos*, 866 F.2d 587, 594 (3d Cir. 1989); *see also United States v. Brasseaux*, 509 F.2d 157, 160, n. 3 (5th Cir. 1975) ("government is not required to prove that a conspirator had full knowledge of the details of the conspiracy; knowledge of the essential nature of the plan is sufficient").

The Government's evidence, viewed in the light most favorable to the Government, is sufficient to uphold the jury's verdict because the evidence established the elements of the crime charged and Jasin's specific intent to violate the underlying statutes.

1. *Existence of Agreement*

The testimony of Faulds, Schuler, Stehman and Shireman established that certain ISC officers and employees were involved in a conspiracy to assist Armscor in breaking the United States arms embargo of South Africa. This evidence, viewed in the light most favorable to the Government, establishes the first element of the conspiracy statute -- an

agreement by two or more persons to violate the laws of the United States as described in the Indictment.

2. *Jasin's Knowing and Willful Membership in the Conspiracy*

The evidence, viewed in the light most favorable to the Government, also establishes that Jasin, knowing that United States components were illegally exported to South Africa, that South African missile parts were illegally imported to the United States, and that technical data was illegally transferred between South Africa and the United States in connection with the Calspan wind tunnel testing, knowingly and willfully joined the conspiracy.

The testimony of Faulds and Banks established that Jasin was aware that United States components, UVP lamp bulbs and Eagle Picher batteries, were illegally exported to South Africa for integration into the Striker missile. A December 22, 1986 letter of intent with South Africa, which was signed by someone using the fictitious name E.M. Blumenthal and a fictitious entity, Technology Associates International (TAI), Belgium (Exh. G-334), adopted the same terms as the Striker program letter of intent sent to Jasin by Kentron officer Vern Davis (Exh. G-332). Exhibit G-332 included a memorandum stating that the contract pricing terms were based "on the assumption that a substantial number of imported components" would be supplied by ISC. Significantly, Exh. G-334, the Blumenthal "letter of intent," states that:

> "The quantities, prices and schedules for the Production Technology and Equipment, as well as the division of responsibilities will be as indicated by you to us in the various discussions we had in 1986 with minor negotiated differences."

Based on the testimony of Ms. Switaj, the Government's handwriting expert, the jury could have concluded that Jasin signed the December 22, 1986 letter of intent. Thus, there was evidence from which the jury could have concluded that Jasin, in violation of the AECA, agreed to provide United States components to South Africa for the Striker missile.

The testimony of Schuler and Stehman, and Exhibits G-91, G-l00, G-111, G-115, G-117, G-119, G-121, G-182, established that Jasin was aware that Striker missile parts, which could not be shipped directly from South Africa to the United States, but rather had to be trans-shipped through Elmer in Italy, where any reference to the components South African origin was to be erased, were illegally imported to the United States. Exhibits G-111, G-115, G-117, G-119, and G-121, detail Jasin's involvement in arranging the illegal trans-shipment of the South African missile components through Italy by disguising their South African origin.

The testimony of Weisinger and Calspan records established that Jasin arranged for wind tunnel testing, misrepresenting to Calspan that South African engineers participated in meetings at Calspan. Bryant testified that the Striker-Calspan test program and information provided to Calspan by Jasin in early 1987 was technical data, constituting an illegal transfer of technical data between South Africa and ISC.

The testimony of Fluhr and Exhibit G-179 established that Jasin did not disclose to either Fluhr or the State Department that South Africa was an essential participant in the development of the Striker missile. The November 13, 1986 fax from Lombard to Jasin, (Exh. G-318), establishes that Jasin knew the importance of the Striker missile program to South Africa, as does the Lombard communication to Jasin in 1987,

prior to the Calspan testing (Exh. G-358). The testimony of Fluhr and Exhibits G-42.5 and G-195 established that Jasin was aware of the applicable law while he acted in furtherance of the conspiracy.

This evidence, viewed in the light most favorable to the Government, and drawing all reasonable inference in favor of the Government, establishes Jasin's knowledge that the Striker missile program assisted Armscor in circumventing the United States arms embargo and his willingness to participate in this scheme in violation of a known legal duty. Such evidence establishes the second element of the conspiracy statute -- Jasin's knowing and wilful membership in the conspiracy to assist Armscor -- and Jasin's specific intent to do an illegal act in violation of a known legal duty. *See Theodoropoulos*, 866 F.2d at 594.

3. *Acts in Furtherance of the Conspiracy*

The evidence, viewed in the light most favorable to the Government, also establishes the third element of the conspiracy statute -- that at some time during the existence of the conspiracy one of the members of the conspiracy committed one or more acts in furtherance of the agreement. All of the acts discussed above -- the illegal export of United States origin components to South Africa, the illegal import from South Africa to the United States of Striker missile parts, and the illegal transfer of technology - are acts in furtherance of the conspiracy.

4. *Summary*

In sum, the evidence, viewed in the light most favorable to the Government, was sufficient for any rational jury to have

found Jasin guilty beyond a reasonable doubt of the conspiracy charged in Count One of the Indictment.

B. Multiple Conspiracies

Jasin argues there were multiple conspiracies proved in this case, not a single conspiracy as alleged in Count One of the Indictment. (Memorandum in Support of Motion for Post Conviction Judgment of Acquittal at 27) According to Jasin, the Striker missile program was not similar in "purpose" or "character" to the schemes that were part of the ISC/Armscor conspiracy. (Memorandum in Support of Motion for Post Conviction Judgment of Acquittal at 27) This is so, Jasin contends, because Striker was "merely an attempt to achieve the undisputably [sic] legal objective of selling the Striker program to China." (Reply to Government's Supplemental response at 10)

The Court must vacate a conviction if there is a "variance" between the indictment and the proof at trial. *United States v. Salmon*, 944 F.2d 1106, 1116 (3d Cir. 1991) (citing *Kotteakos V. United States*, 328 U.S. 750, 66 S. Ct. 1239 (1946). If a "single conspiracy has been alleged, a variance of proof occurs if the evidence shows merely multiple Conspiracies." *Id.*

The jury was instructed by the Court of the issue of multiple conspiracies. Whether the evidence establishes a single conspiracy or multiple conspiracies is a fact question for the jury. *United States v. Smith*, 789 F.2d 196, 200 (3d Cir.), *cert. denied*, 479 U.S. 1017, 107 S. Ct. 668 (1986). A three-step analysis is used to decide whether a jury's finding of a single conspiracy should be upheld. This analysis seeks to determine: (1) whether there was a common goal among the conspirators; (2) whether, considering the nature of the scheme, it

contemplated achieving a continuous result that would not continue without the cooperation of the conspirators; and (3) the extent to which the participants overlap. *United States v. Kelly*, 892 F.2d 255, 259 (3d Cir. 1989), *cert. denied*, 497 U.S. 1006, 110 S. Ct. 3243 (1990). Under this three-step analysis, the jury's finding in this case was supported by substantial evidence.

1. *Common Goal Among Conspirators*

Viewing the evidence in the light most favorable to the Government, the Court concludes that a reasonable jury could find the existence of a single conspiracy with a common goal among the conspirators of assisting Armscor in circumventing the United Nations and United States arms embargo of South Africa. Faulds' testimony detailed the long-term relationship between ISC officers Guerin and Ivy and Armscor, and Ivy's overall direction of South African related activities at ISC. Faulds explained that Ivy solicited the participation of various ISC employees to assist him to accomplish the goal of the conspiracy -- breaking the United States arms embargo of South Africa -- and stated that the Calspan testing was part of the conspiracy. (Direct Testimony 11/6/92) The evidence was sufficient to have permitted the jury to conclude that the goal of the Striker missile program, directed by Jasin, was the same as the overall goal of the conspiracy, circumventing the arms embargo of South Africa.

2. *Conspiracy Contemplated Achieving a Continuous Result*

The evidence, viewed in the light most favorable to the Government, also established that, considering the nature of the scheme -- aiding Armscor in breaking the arms embargo it contemplated achieving a continuous result and the actions of

each of the conspirators were either "necessary or advantageous to . . . the overall success of the venture." *Kelly*, 892 F.2d at 259 (quoting *United Sates V. DeVarona*, 872 F.2d 114, 118 (5th Cir.1989)). Notably, the November 13, 1986 fax from Lombard to Jasin (Exh. G-318) discloses the importance of the Striker missile program to South Africa, and the goal of circumventing the arms embargo, as does the Lombard communication to Jasin in 1987, prior to the Calspan testing (Exh. G-358). *See United States v. Curran*, 1993 WL 137459 at *11 (E.D. Pa. 1993) (existence of single conspiracy will be inferred where the nature of the activity is such that knowledge on the part of one member concerning the existence and function of other members of the same scheme is necessarily implied due to the overlapping nature of the various roles of the participants).

3. *Extent of Participants' Overlap*

The evidence, viewed in the light most favorable to the Government, also established that many of the same co-conspirators, including Guerin, Ivy, Faulds and Schuler, participated in many phases of the conspiracy, including Striker. The fact that Jasin participated in only one aspect of the conspiracy does not derogate from the conclusion that there was overlap among the participants in the conspiracy.

4. *Summary*

In sum, the evidence, viewed in the light most favorable to the Government, was sufficient for any rational jury to have found a single conspiracy as charged in the Indictment.

C. Withdrawal from the Conspiracy

Jasin finally contends that, assuming, *arquendo*, the Striker missile program was part of the overall Armscor - ISC conspiracy, he took affirmative steps to abandon the objectives of the conspiracy. (Memorandum in Support of Motion for Post Conviction Judgment of Acquittal at 35) In support of his argument, Jasin points to the cancellation of the Sikorsky helicopter testing at Wright Malta in September, 1986, and his demotion as President of ISCT in March, 1987, which, according to Jasin, was inconsistent with his participation in the conspiracy. (Memorandum in Support of Motion for Post Conviction Judgment of Acquittal at 37; Reply Memorandum to Government's Supplemental Response at 13)

As part of his withdrawal argument, Jasin further contends that any acts by Jasin associated with the Striker missile program occurred prior to October 30, 1986, outside the five year statute of limitations for Count One. He contends that because his membership in the conspiracy is based solely on his involvement with the Striker missile program, his withdrawal from the conspiracy must be measured by his actions with respect to the same program. It is Jasin's position that because he was acquitted on the substantive Count Twenty-Four, which alleged the transfer of defense articles arid services on or about August, 1987, the jury could not have found that Jasin's participation in the Calspan testing was part of the conspiracy. (Memorandum in Support of Motion for Post Conviction Judgment of Acquittal at 35; Reply Memorandum to Government's Supplemental Response at 13)

Jasin presented his defense of withdrawal from the conspiracy to the jury, which was then charged by the Court on the issue. The burden was on Jasin to prove withdrawal, *United States v. Gillen*, 599 F.2d 541, 548 (3d Cir.), *cert. denied*, 444

U.S. 866, 100 S. Ct. 137 (1979); *United States v. Steele*, 685 F.2d 793, 804 (3d Cir.), *cert. denied*, 459 U.S. 908, 103 S. Ct. 213 (1982); *United States v. De Peri*, 778 F.2d 963, 979-80 (3d Cir. 1985), *cert denied*, 475 U.S. 1110, 106 S. Ct. 1518 (1986). "The defendant must present evidence of some affirmative act of withdrawal, typically either a full confession to the authorities or communication to his co-conspirator that he has abandoned the enterprise and its goals." *Steele*, 685 F.2d at 803. Absent withdrawal, liability continues for all actions in furtherance of the conspiracy by the other conspirators. *Pinkerton v. United States*, 328 U.S. 640, 646, 66 S. Ct. 1180, 1183 (1946); *Virgin Islands v. Dowling*, 633 F.2d 660, 666 (3rd Cir. 1980)

In *Hyde & Schneider v. United States*, 225 U.S. 347, 39 S. Ct. 793 (1912), the Supreme Court held that the defendant's retirement and disclosure to authorities could be disregarded by the jury where he failed to make subsequent additional disclosures to the government. The Third Circuit in *United States v. Lowell*, 649 F. 2d 950, 955 (3d Cir. 1981), held that where the defendant retires, to claim withdrawal from a conspiracy the defendant also was required to show his severance of all ties to the business and the deprivation of all ties to the remaining conspirator group. *See also United States v. Lash*, 937 F.2d 1077, 1083 (6th Cir.1991), *cert. denied*, 112 S. Ct. 943 (1992) (involuntary termination of employment does not establish withdrawal from a conspiracy absent some affirmative act); *De Peri*, 778 F. 2d at 980 (notice of retirement does not meet the burden of establishing a prima facie case of withdrawal).

1. *No Affirmative Acts of Withdrawal*

The evidence, viewed in the light most favorable to the Government, is sufficient to establish that Jasin did not withdraw from the conspiracy. The Government elicited

testimony from Jasin that despite the cancellations of the Sikorsky testing at Wright Malta, advanced by Jasin as evidence of his withdrawal, he continued to explore the possibility of testing the missile on Guerin's farm, meeting with Guerin's attorney on October 8, 1986, to discuss this idea. The Government's evidence also showed that despite Jasin's demotion in March, 1987, he did nothing to stop the transfer of windtunnel technical data or inform the Government of ISC's violations of the export law. Moreover, Jasin did not sever all ties to ISC. *See Lowell*, 649 F.2d at 955. Instead, Jasin remained employed at ISC, writing to Guerin on July 31, 1987 that Jasin felt "good about being at ISC." (Exh. G-'514) In short, the evidence establishes only that Jasin was involuntarily demoted. That alone does not establish withdrawal from the conspiracy. *See Lash*, 937 F.2d at 1083.

2. *Jasin's Participation in the Conspiracy Within the Period of the Statute of Limitations*

The Government's evidence, viewed in the light most favorable to the Government, also showed that Jasin committed acts in furtherance of the conspiracy within the period covered by the five year statute of limitations, that is, after October 30, 1986. The Government established that on November 13, 1986, Jasin received a statement of work from Lombard concerning the Calspan testing. (Exh. G-318) In December, 1986, Jasin telephoned Calspan regarding planned testing and in January, 1987, through his secretary, again contacted Calspan to set up a meeting for February. (Exh. G-349) Within the five year statute of limitations, Jasin also travelled with South African engineers to Calspan, misrepresenting the South Africans as British citizens, employed by ISC. Jasin additionally forwarded to Calspan a statement of work prepared by South African engineers and shipped to Calspan for testing purposes a missile illegally imported from South Africa at his direction. (Exh.

G-367, 380) These activities took place prior to Jasin's demotion in March, 1987.

The jury could reasonably have concluded that some or all such activities, which took place within the period of the statute of limitations, were acts in furtherance of the conspiracy, despite its finding of not guilty as to Count Twenty-'Four, the count that covered the Calspan wind tunnel testing. This is so because an acquittal on one charge does not affect a jury finding of guilt on another charge which is dependent on the same factual allegations. *See United States v. Powell*, 469 U.S. 57, 64-5, 105 S. Ct. 471, 476-77 (1984) ("'The most that can be said . . . is that the verdict shows either in the acquittal or the conviction that the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt'") (quoting *Dunn v. United States*, 477 U.S. 10, 100 S. Ct. 1999 (1932)); *see also United States v. LBS Banks-New York, Inc.*, 757 F. Supp. 496, 500, n. 6 (E.D. Pa. 1990) (DuBois, J.) (an acquittal on one charge and a conviction on another charge which is dependent on the same factual allegations does not necessarily indicate that the jury found insufficient evidence to convict that defendant; instead, the acquittal could be a product of juror lenity).

3. *Summary*

In sum, the evidence, viewed in the light most favorable to the Government, was sufficient for any rational jury to have found that Jasin did not withdraw from the conspiracy and that he participated in the conspiracy within the period covered by the five year statute of limitations.

An appropriate Order follows.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD DISTRICT

No. 98-1641

UNITED STATES OF AMERICA

v.

THOMAS JASIN

SUR PETITION FOR REHEARING

Dated: Sept. 20, 1999

Present: BECKER, *Chief Judge*, SLOVITER, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, and RENDELL, *Circuit Judges*

The petition for rehearing filed by

Appellant Thomas Jasin

in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for

rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ [Illegible]

Circuit Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

91-00602-08

UNITED STATES OF AMERICA

v.

THOMAS JASIN

JURY INSTRUCTION NO.

MULTIPLE CONSPIRACIES

You may judge defendants only on the charges alleged in the indictment. In other words an individual cannot be charged with one crime and be convicted of another. Furthermore, he cannot be convicted of a crime charged in an indictment by virtue of proof that he committed some other uncharged offense.

In this case, the defendant contends that the government's proof fails to show the existence of only one overall conspiracy. Rather, it is claimed that there were actually several separate and independent conspiracies with various groups of members and, at best, Defendant Jasin was involved in a conspiracy outside of the one charged in the Indictment.

Two or more conspiracies cannot be merged by the Government in a single Indictment for the sake of convenience, even if you find that all the alleged transactions occurred in this case. There must be evidence linking all the charged conduct together into a single overall conspiracy, and you must so find. In addition, you must find that the defendant himself was involved in that one master charged conspiracy.

The determination of the number of conspiracies is a question of fact for you the jury. Therefore, you must find whether one overall agreement bound all of the defendants charged in the indictment or whether distinct groups are engaged in separate adventures of like character. Proof of several separate and independent conspiracies is not proof of the single, overall conspiracy charged in the indictment, unless one of the conspiracies proved happens to be the single conspiracy described in the Indictment.

You may find that there was a single conspiracy despite the fact that there were changes in either personnel by the termination, withdrawl [sic], additions of new members, or activities, or both, so long as you find that some of the co-conspirators continued to act for the entire duration of the conspiracy for the purpose(s) charged in the Indictment. The fact that the members of a conspiracy are not always identical does not necessarily imply that separate conspiracies exist.

On the other hand, if you find that the conspiracy charged in the Indictment did not exist, you cannot find any defendant guilty of the single conspiracy charged in the Indictment. This is so even if you find that some conspiracy other than the one charged in this indictment existed, even though the purposes of both conspiracies may have been the same and even though there may have been some overlap in membership.

Again, if you find that defendant Jasin was a member of another conspiracy, and not the one charged in the indictment, they [sic] you must thus acquit him of the conspiracy charge.

Therefore, what you must do is determine whether the conspiracy charged in the indictment existed and that a common purpose motivated each participant and each act. You then must determine the nature of the conspiracy and who were its members.

If you determine that Thomas Jasin willfully joined that conspiracy, then you must convict him of the conspiracy charges.

Should you find that there is evidence of more than one conspiracy, evidence relating to these other conspiracies, not charged in the Indictment, cannot be used to determine the guilt of any defendant, unless you find that the defendant was part of the charged conspiracy. Under those circumstances, you may convict the defendant.

United States v. Samuels, 741 F.2d 570 (3rd Cir. 1984)
United States v. Gamiel, 519 F. Supp. 1238 (E.D. Pa. 1981)
United States v. Snider, 720 F.2d 985 (8th Cir. 1983)
United States v. Lyons, 670 F.2d 77 (7th Cir. 1982)
United States v. Bertolotti, 529 F.2d 149 (2nd Cir. 1975)
United States v. Bailey, 607 F.2d 239 (9th Cir. 1975)
Modern Federal Jury Instruction Release No. 16, June 1, 1992; No. 19-5